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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

HARLAN GRIMES, *Petitioner*

v.

EDWIN T. MAYNARD, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT WACO AND ARGUMENT IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

HARLAN GRIMES, *Petitioner*

v.

EDWIN T. MAYNARD, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Harlan Grimes, prays for writ of certiorari to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco to bring up for review here the judgment of said court affirming the action of the trial court denying petitioner relief from a judgment which is agreed is "very senile, VERY SENILE" and denying petitioner damages for the fraud practiced and perpetrated upon petitioner and upon the courts of Texas, which fraud caused the courts of Texas to perpetrate a fraud upon petitioner. The opinion sought to be reviewed is *Grimes v. Maynard et al* and is reported in 270 SW 2d 282. There is by reference made a part thereof the record and judgment in *Grimes et al v. Talbot et al.*, which is the case in which the senile decision occurred,

and which petitioner contends is void, such case being reported in 233 SW 2d 206.

STATEMENT OF GROUNDS OF JURISDICTION

The judgment of the Court of Civil Appeals at Waco in Case No. 3180 was entered on June 24, 1954. Thereafter motion for rehearing was overruled on July 30, 1954. (R 81)

On August 16, 1954 petition for writ of error to the Supreme Court of Texas was filed and motion for rehearing in the Supreme Court of Texas in Case No. A-4879 was denied on November 24, 1954.

This application for writ of certiorari is being filed within ninety days of November 24, 1954, as provided in Section 2101, Subsection (c), *United States Code, Title 28.* The jurisdiction of the Supreme Court is invoked under Section 1257, Subsection 3, of *Title 28, United States Code,* and *Supreme Court Rule 19 (1) (a),* and/or in the alternative under Section 1651 (a), *Title 28, United States Code* and *Rule 30* of this Honorable Court.

QUESTIONS PRESENTED

(1) Is a decision by an intermediate appellate court of Texas, which all agree to be "very senile, VERY SENILE" and which is contrary to the established law of Texas, void?

(2) Does a senile decision by an intermediate appellate court of Texas which is contrary to the estab-

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lished law of Texas, deprive petitioner of his property without due process of law as guaranteed by the First Section of the Fourteenth Amendment to the United States Constitution?

(3) Does a senile decision by an intermediate appellate court of Texas, which is contrary to the established law of Texas deprive petitioner of the equal protection of the laws of Texas as guaranteed by the First Section of the Fourteenth Amendment to the United States Constitution?

(4) Do decisions by the courts of Texas which deny petitioner damages for the fraud perpetrated upon petitioner, directly, and upon the courts, which caused the courts of Texas to perpetrate a fraud up petitioner deprive petitioner of his property without due process of law, using such senile decision as a basis for such denial, even though some of the fraud occurred after the senile decision?

(5) Do decisions by the courts of Texas which deny petitioner damages for the fraud perpetrated upon petitioner, directly, and upon the courts of Texas, which caused the courts of Texas to perpetrate a fraud upon petitioner, deny petitioner the equal protection of the laws of Texas, using as a basis for such denial said senile decision, even though some of the fraud occurred after the senile decision?

(6) Is a senile decision by an intermediate appellate court of Texas which is contrary to the established law of Texas, in accord with the applicable decisions of the Supreme Court of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Section of the Fourteenth Amendment to the United States Constitution provides: "*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1257, *Title 28, United States Code* provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

Section 1651 (a), *Title 28, United States Code* provides: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF MATERIAL FACTS

Petitioner, Harlan Grimes and his brother Russell

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W. Grimes, drilled, equipped and COMPLETED a gas-condensate well, No. 1 M. B. Ellis, on a block of over 4,000 acres in Houston County, Texas, which well had a rated potential of 29,000,000 cubic feet of gas per day by official Texas Railroad Commission test. (R 92). They made a contract with A. G. Talbot and E. T. Maynard (R 92) whereby if said Talbot and Maynard drilled and abandoned as a dry hole the first of four proposed wells under said contract then they were to be reimbursed for 100% of their expenditures out of production from the Grimes No. 1 Ellis well. If Talbot and Maynard drilled the second well and it was dry then they could abandon their contract and be reimbursed 125% of their expenditures out of Grimes No. 1 Ellis well plus any well they may have drilled and completed. If the third well of such four wells, Talbot and Maynard should drill, should be dry then they could abandon their contract and be reimbursed 150% of their expenditures out of production from Grimes No. 1, Ellis and any wells they may have drilled and completed. If they drilled, equipped and COMPLETED THE FOURTH WELL under the contract then they would be entitled to an undivided one-half interest in the block of leases. (R 98) Talbot and Maynard drilled and abandoned the first well, drilled, equipped and COMPLETED the second and third wells under such contract and drilled and equipped (and later expropriated the equipment on the fourth well to their own use and benefit) BUT DID NOT COMPLETE THE FOURTH WELL UNDER SUCH CONTRACT, (R 3, 4) and aban-

doned said contract by refusing to spend "*** another d—— cent on the Houston County properties" (R 4). Talbot and Maynard secured possession of an assignment which had been placed in escrow by fraud, deceit and trickery (R 3) and immediately had it recorded which was a cloud upon petitioner's title and still remains so. Case No. 7773 was filed in the District Court of Houston County, Texas to quiet title to said leases in petitioner and his brother. (R 84). Special exceptions were sustained thereto and an appeal was taken to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston and there docketed as Case No. 12,195. Such court found practically all the facts and all the law in favor of appellants, Harlan Grimes and Russell W. Grimes, affirmed the established law of Texas, and then in the same decision, by logic and reasonsing that defies description (R 119 to 124) overruled the established law of Texas, such opinion being in the appendix hereto. Thereafter application for writ of error to the Supreme Court of Texas was denied and after the mandate was filed Mr. B. W. King, attorney for appellees therein referred to such decision as "very senile, VERY SENILE." (R 12). Petitioner has at all times agreed with Mr. King on that statement. (R 12).

Thereafter other fraud (R 30-33) was perpetrated upon petitioner in pursuance of the same continuing conspiracy as set out.

Thereafter petitioner filed his petition (R 2) in

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Case No. 8083 in the District Court of Houston County, Texas, setting up the fraud perpetrated upon petitioner and upon the courts of Texas, which caused the courts of Texas to perpetrate a fraud upon petitioner and in such petition pleads the necessary Federal questions which this Honorable Court is asked to pass upon (R 28, 29). Such petition seeks to set aside the assignment obtained by fraud upon petitioner and upon the courts of Texas, to set aside the senile decision and have a sane decision promulgated in lieu therof, and for damages due to the fraud, some of which occurred after the date of the senile decision. (R 30-33). Such Federal questions have been retained in all pleadings (R 28, 29), in Case No. 8083 in the District Court of Houston County, Texas and throughout this appeal. The District Court sustained special exceptions to the Federal questions and the Court of Civil Appeals at Waco and the Supreme Court of Texas did not pass upon such questions. (R 67, 68).

After the District Court of Houston County, Texas sustained the special exceptions in Case No. 8083, such case was appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston and there docketed as Case No. 12,692. Thereafter the Supreme Court of Texas (R 73) transferred such case to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, and same was there docketed as Case No. 3180, and is here for review. The court at Waco affirmed the District

Court of Houston County and application for writ of error was filed and the same was denied by the Supreme Court of Texas, the final overruling of the motion for rehearing was on November 24, 1954, by the Supreme Court of Texas (R 82). The Supreme Court of Texas did not render any opinion in either case. The opinion of the Court of Civil Appeals at Galveston is as agreed (R 12) "very senile, VERY SENILE" and as petitioner contends is so senile that it comes in the same category as senile wills. Such opinion states (R 119) "*** they pled (1) that there was no lawful delivery of the assignment to appellees, and (2) that if there was such delivery, the assignment never became effective to transfer the title to the undivided half interest in the leases because the transfer was made subject to a condition precedent, which condition or event never occurred." And the opinion further states (R 120) "Paragraph 13 provides 'if the First Parties drill the fourth well hereunder, upon the completion of said fourth well First Parties shall have fully complied with all of their obligations hereunder and shall be entitled to receive without conditions assignments to a full undivided ½ interest ***' "

Further such opinion states (R 122) "*** they content themselves, as we understand them, with the contention that the assignment was made upon the condition precedent that the fourth well must be completed. *** Then comes this language which appellants (R 123) contend constitutes the full completion of the

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fourth well a condition precedent to the passing of the title, to wit:

" 'It is further understood and agreed that this assignment is the same assignment referred to and contemplated in a certain contract in writing between the assignors herein' and appellees 'of date July 14, 1943, and that this assignment is subject to all of the terms, conditions, provisions and obligations set forth in said contract;' ***."

"As appears above, the contract provided, in paragraph 13, that completion of the fourth well constituted a full compliance with all of appellees' obligations and that they 'shall be entitled to receive without condition the assignment.' The escrow agreement protected appellants, and it was so intended, until appellees had fully complied with their obligations. 'Whether a covenant is to be deemed precedent or subsequent depends upon the intention of the parties as shown by the instrument, and not upon the use of any particular set of technical words.' Devlin on Deeds, 3rd Series, Vol. 2, 1779, Sec 958. There is nothing in the language of the assignment which in and of itself would show that the completion of the fourth well was made a condition precedent to the vitality of the assignment. Of course, under appellants' pleadings it must be taken as true that the fourth well lacked something of completion, though it appears from said pleadings that it was drilled to the Woodbine Sand."

"Since it does not appear from the assignment that

the full completion of the fourth well was a condition precedent, it must be made to appear by appellants from the contract that the completion of the fourth well was a condition precedent to the passing of title. The contract certainly intended that title should not pass until the completion of the fourth well, and this was protected against by an escrow agreement. But there is nothing in the contract to show any intention that title should not pass upon the delivery of the assignment out of escrow, but, to the contrary, the contract is not reasonably subject to any other construction."

(R 124) "It was held in *Manton v. City of San Antonio,* 207 S.W. 951, 952, writ refused, 'The general rule is that if the grant is without other consideration than the performance of the specified precedent, and the converse of this proposition must be just and beneficient, and where there have been other considerations performed, and especially where full value has been paid, the condition will not be considered a condition precedent, but will have applied to it the rules applicable to conditions subsequent.' Applying this rule, since it appears from appellants' allegations that the contract required that appellees drill four wells into the Woodbine sand, and it appears that this has been done, it is necessary to construe the condition in the assignment, if a condition it is, as a condition subsequent."

On page 11 of the record is "Plaintiff alleges that at no time has full value been paid and therefore the

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condition is a condition precedent and should not have applied to it the rules applicable to conditions subsequent. Plaintiff alleges that the proper reading should have been and would have been, except for the fraud and deceit of the defendants hereinbefore and hereinafter set out, 'Applying this rule since it appears from appellants allegations that the contract required that appellees drill, EQUIP AND COMPLETE four wells into the Woodbine sand, and it appears that this has NOT been done, it is necessary to construe the condition in the assignment a condition precedent.' "

Throughout the petition and supplement (R 2 through 35) is a clear picture of the fraud perpetrated upon the courts of Texas by the attorneys representing the appellees in Case No. 12,195, and which fraud overreached each and all of such courts to the extent that the result thereof was the decision by the Court of Civil Appeals at Galveston which was described by Mr. King (R 12) "very senile, VERY SENILE," and which as alleged is void, because of such senility.

To understand the meaning of the word "complete" or "completion" as applied to a well, we can look to page 88 of the record where we find: "*** under the terms of said contract, contractor defendants were bound and obligated to drill and complete the fourth of said wells; that they drilled same but failed and refused to complete same and long since have abandoned the completion of said well; that within the contemplation of the parties to said contract, at the

time they made and entered into same and in their dealings with respect to the performance of their obligations and the exercise of their options thereunder, the words 'complete' and 'completion' as applied to said fourth well meant that said well should not be deemed a dry hole until contractor defendants had done all things which a reasonably prudent operator engaged in the same or similar business and under the same or similar circumstances would believe were reasonably necessary to preclude a reasonable belief that oil or gas would be produced in paying quantities through said well from the upper Woodbine sand penetrated by said well."

The petition in Case No. 8083 was filed, and when that was appealed to the Court of Civil Appeals at Galveston, the Supreme Court of Texas then transferred it to the Court of Civil Appeals at Waco, which is a court of equal jurisdiction with that of the Court of Civil Appeals at Galveston and being equal does not have the authority to overrule a court of equal jurisdiction. The Supreme Court of Texas in neither instance, that is in the appeal in Case No. A-2914 or in Case No. A-4879 passed upon the merits of either case, and each and all of the courts herein involved have deprived this petitioner of his property without due process of law as provided for and as guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution and each and all of the courts of Texas have denied to this petitioner the equal protection of the laws of Texas which is as is set out in *Manton v. San Antonio,* supra, and which should have

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been in Case No. 12,195 and would have been except for the fraud of the respondents which overreached the courts involved and caused the senile decision.

The fraud perpetrated upon this petitioner after (R30-35) the mandate was filed in Case No. 7773 in the District Court of Houston County, Texas is that the respondents herein told petitioner that E. T. Maynard had had a heart attack and would never again be able to transact any business, leave his home at Winneka, Illinois, and many other things along the same line, which induced this petitioner to enter into the agreed judgment in Case No. 7997, which petitioner would not have entered into except for said fraud, that petitioner wanted to take the deposition of E. T. Maynard, to show that he had no good faith intention of completing the fourth well under the contract but that his, E. T. Maynard's, only intention was to secure possession of the assignment by fraud as was done. Such fraudulent representations as to the health of E. T. Maynard were made subsequent to the filing of the mandate in Case No. 7773, and prior to the agreement in Case No. 7997 and immediately after the entry of the judgment in Case No. 7997, E. T. Maynard and family left on a three months trip to help Paris, France celebrate its 2000th anniversary (R 33), and actionable damages are herein alleged (R 30-33) and the Court of Civil Appeals at Waco found that such was not a justiciable question, (R 73) thereby depriving petitioner of the equal protection of the laws and denying to petitioner due process of law in his attempt to recover for what he has been damaged by the fraud of the respondents herein. In the event that

this Honorable Court should hold that this petition for writ of certiorari is not sufficient, then, and in that event, this petition should be treated as a petition from a writ of mandamus and the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston should be ordered to revise its opinion to comply with the law and the facts as it found them to be and that such court should be ordered to promulgate a sane decision in lieu of the senile decision which it is agreed such court did promulgate.

Special exception No. XIX was directed at the federal questions and were sustained by the court, (R 67) and affirmed by the Court of Civil Appeals at Waco. (R 74)

The Federal questions were raised (R 28) in the following manner: "Plaintiff alleges that the three Courts, namely, the District Court of Houston County, Texas, the Court of Civil (R 29) Appeals for the First Supreme Judicial District of Texas at Galveston and the Supreme Court of Texas, have attempted to and have used property of this plaintiff unlawfully without any consideration to the rights of this plaintiff and without due process of law, in violation of Section I, Article XIV of the Amendments to the Constitution of the United States of America."

"Plaintiff alleges that the District Court of Houston County, Texas, and the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston, and the Supreme Court of Texas have denied to this plaintiff the equal protection of the laws of the State of Texas in violation of Section I,

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Article XIV of the Amendments to the Constitution of the United States of America."

The District Court of Houston County, Texas, in Case No. 8083, the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco in Case No. 3180 and the Supreme Court of Texas in Case No. A-4879 have each and all deprived this petitioner of his property without due process of law in refusing to set aside the senile decision and in denying petitioner damages in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and each and all of said courts have denied petitioner the equal protection of the laws of Texas by refusing to allow petitioner damages as alleged in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

On page 28 of the record is: "Since there was no consideration paid for the letter dated June 30, 1944, plaintiff hereby withdraws and cancels his signature thereon since the same has been used fraudulently, and it was the purpose to so use the same at the time that his signature thereto was obtained. Plaintiff withdraws, cancels and nullifies his signature on the assignment referred to as Exhibit "B" since full consideration has never been paid therefor, and the facts and circumstances have never existed whereby such assignment was to be and become effective; and also in view of the fact that delivery thereof was obtained through fraud as herein set out."

"Plaintiff herewith (R 32) because of the fraud hereinbefore (R 33) and hereinafter set out, with-

draws as a party to said agreed judgment and withdraws his signature therefrom."

"That thereafter the said E. W. Robitaille informed this plaintiff that the defendant E. T. Maynard had gone on a three-month trip to Paris, France, to help the City of Paris, France, celebrate its 2000th anniversary. Plaintiff alleges that said E. T. Maynard did go to Paris, France; that he was physically able to withstand such a trip and that at the time referred to, in March, 1951, that the said E. T. Maynard was physically and mentally able to give a deposition concerning all of the above mentioned matters and things. That since learning of said trip by the said E. T. Maynard, plaintiff has done nothing to ratify, condone or approve said judgment or said fraud, deceit or corruption."

REASONS FOR ALLOWANCE OF WRIT

The Court of Civil Appeals at Galveston in Case No 12,195 in effect affirmed *Manton v. City of San Antonio,* 207 S.W. 951 and then in effect in the same opinion, 233 S.W. 2d 206 overruled *Manton v. City of San Antonio,* 207 S.W. 951, which had been affirmed by the Supreme Court of Texas, thereby in effect overruling the Supreme Court of Texas.

If the Court at Galveston did not have authority to overrule the Supreme Court of Texas insofar as the ruling in *Manton v. City of San Antonio,* 207 S.W. 951, is concerned then would not the decision in Case No. 12,195 be a nullity, a void, a vacuum, having been done without any authority AB INITIO?

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SUMMARY OF ARGUMENT

Petitioner presents herein his argument to the effect that the senile decision should be held to be void, the same as senile wills. No authority making such holding has been found and this is a case of first impression on that point. The District Court in Case No. 7773 and the Court of Civil Appeals at Galveston in Case No. 12,195 misconstrued the law as to the undisputed facts. The District Court in Case No. 8083 and the Court of Civil Appeals at Waco misconstrued the law in denying petitioner relief from the senile decision and failing to hold that petitioner has been damaged by the fraud of respondents. Petitioner has been denied due process of law and the equal protection of the laws. There is no exception to the fact the fourth well had to be completed before the assignment became effective and the effect of the holdings of the lower courts is that the fraud of respondents plus the senile decision physically completed the fourth well six thousand feet below the surface of the ground, even though they were far removed from the well site.

ARGUMENT

It is the general rule that if the performance of a condition is the sole or primary consideration for a conveyance such condition will be held to be a condition precedent, *Manton v. City of San Antonio,* 207 S.W. 951 (Er. Ref.); *Spinks v. First Christian Church of Vera,* 273 S.W. 815 (Tex. Com. of Apps.); *Spiller v. McGehee,* 68 S.W. 2d 1093 (Civ. Apps.) and *Clark v. Womack,* 142 S.W. 2d 954 (Dis. Judgm. Cor.).

Respondents were to pay nothing except four completed wells for a half interest in the block. They have not completed their contract. They have nothing except their own fraud and deceit plus a senile decision to give them any color of title.

In the case of *Manton v. City of San Antonio,* 207 S.W. 951 (Er. Ref.), the Court stated the applicable rule, at page 952, in the following language:

> "There is no exception to the rule that a deed cannot be delivered to the grantee as an escrow, but if delivered to him it becomes an operative deed, freed from any condition NOT EXPRESSED IN THE DEED ITSELF." (Emphasis supplied)

The condition precedent is expressed in the contract and it was so held by the Court of Civil Appeals at Galveston in the following language: "The contract certainly intended that title should not pass until the completion of the fourth well."

In the case of *Spinks v. First Christian Church* (Tex. Com. Apps.), 273 S.W. 815, wherein a deed in controversy was construed to contain a condition precedent, the Court at page 816, said:

> "In other words, the deed was lying domant until it should be vitalized and given life by the performance of this condition precedent. The deed merely gave to this church this right to acquire title to this lot by doing a certain thing beforehand. It required affirmative action to bring the deed into being."

The fact that the assignment was delivered to the assignees after almost complete performance of the

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contract to drill and complete four wells is immaterial. The completion of the fourth well was a condition precedent to the passage of title to the assignees, and in such case title does not pass until the condition is performed. Substantial performance is not sufficient. *Manton v. City of San Antonio,* 207 S.W. 951 (Er. Ref.), wherein, the Court, after stating that a substantial performance of the terms of a condition would prevent a forfeiture of title, said, at page 952:

> "The law, much less equity, does not favor FORFEITURES, but, in the case of CONDITIONS PRECEDENT, it will not permit the title to pass until the condition is performed." (Emphasis supplied)

In 49 C. J. S., Paragraph 269, page 486 we find:

> "The fact that a judgment was obtained through fraud or collusion is universally held to constitute a sufficient reason for opening or vacating such judgment either during or after the term at which it was rendered."

The Texas cases cited thereunder are *Crouch v. McGaw,* 138 S.W.2d 94,134, Tex. 663,*Ferguson v. Ferguson,* Civ. App. 98 S.W. 2d 847-850, *Brammer & Wilder v. Limestone County,* Civ. App., 98 S.W. 2d 99, and *Saunders v. Saunders,* Civ. App., 293 S.W. 899.

The 12th Syllabus of the above cited Crouch case reads:

> "After expiration of term Court can set aside void judgments and judgments obtained by frauds."

The tenth syllabus of the Ferguson case above cited reads:

> "Judgment may be opened or vacated for fraud or collusion either before or after term at which it is rendered."

In *Connecticut General Life Insurance Co. et al. v. Bryson,* 219 S.W. 2d 799 is "*** Rarely has this Court ever consented to re-examine on the second appeal of a case, its holding of the first appeal of the same case, but its authority to do so and to enter judgment in conformity with its decision upon re-examination, even though such judgment overruled the prior judgment, cannot be questioned." (Citing five Texas cases.) "*** It would be unthinkable for this Court, * * * to hold that it is bound by considerations of consistency, to perpetuate that error. Our duty to administer justice under the law, as we conceive it, outweighs our duty to be consistent."

"The Court either of its own motion or on application of a party, may correct or amend a judgment after the expiration of the term at which it was obtained, when through mistake or clerical error, the record does not speak fully or truly as to the judgment actually rendered; possessing inherent power over its record the Court may make the entry for the sake of verity and in order to prevent injustice." *Weaver v. Humphrey,* 114 S.W. 2d 609.

In *Pearl Assurance Co. v. Williams,* 167 S.W. 2d 808, December 4, 1942, since the new rules became effective, at page 812 the Court of Civil Appeals at

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Fort Worth said "It is the well settled rule in this State that the bill of review in equity is the proper remedy for setting aside a judgment procured by fraud. *** Appellant having sufficiently pleaded its equitable cause of action it was reversible error for the Court to sustain special exceptions thereto and deprive it of an opportunity to have its right tried upon their merits."

When the above is considered in connection with the authorities holding it to be the Court's duty to correct even clerical errors upon its own motion then it would seem to be mandatory that a Court correct a senile decision which would appear to be of greater magnitude of error than a mere clerical mistake, especially in view of the fact that such senile decision was procured by the fraud, deceit and corruption of respondents by virtue of a conspiracy which is still in existence. Such senility of such decision taken in conjunction with the fraud of respondents has certainly deprived petitioner of his day in Court and prevented petitioner from presenting his case upon its merits.

Where the judgment of a state court ascribing to the judgment of another court the binding force and effect of res judicata is challenged for want of due process, it becomes the duty of the United States Supreme Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the "due process of law" which *United States Constitution, Amendment Fourteen*

prescribes. *Hansberry v. Lee*, 61 S.Ct. 115, 311 U.S. 32, 85 L.Ed. 22,132 A.L.R. 741.

It is petitioners contention that a senile decision is not "due process of law."

In *Stanolind Oil and Gas Co. v. Barnhill*, 107 S.W. 2d, 746-749 "*** it is not the duty of the courts to make contracts for parties but only to construe such contracts as they make for themselves."

In *Lockett & Williams v. Gross Mfg. Co.*, Ga. 1911, 70 S.E. 255-257 "*** And in any case where it can be shown that the prior judgment was fraudulently obtained, either because the plaintiff in the antecedent case did not make a fair representation of the facts of his case, or because the finding therein was induced or procured by perjury, the effect of the judgment in his favor is invalidated."

In *Jackson v. Harris et al.*, 43 F2 513-516, 10th Cir. (Okla) is "*** where contracts have been entered into or rights acquired upon the faith of a decision, they cannot be impaired by a change of construction made by a subsequent decision." *Moore-Mansfield Co. v. Electrical I. Co.*, 234 U.S. 619-623, 34 S.Ct. 941, 58 L. Ed. 1503; *Douglass v. County of Pike*, 101 U.S. 677, 687, 25 L. Ed. 968; *Green County v. Conness*, 109 U.S. 104, 3 S.Ct. 69, 27 L. Ed. 872; *New Buffalo v. Cambria I. Co.*, 105 U.S. 73, 26 L. Ed. 1024; *Tidal Oil Co. v. Flanagan* 263 U.S. 444, 451-452, 44 S.Ct. 197, 68 L. Ed. 382.

Douglass v. Pike Co. Mo., 101 U.S. 677, 25 L. Ed. 968 3rd Syllabus reads "The true rule, is, to give a change

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of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendement; that is to say, make it prospective, but not retroactive."

Certainly, it was retroactive to affirm, then overrule in *Manton v. San Antonio,* supra.

In *Brinkerhoff-Faris Trust and Savings Co. v. Hill County Treas.* 50 S.Ct., 451, 281, U.S. 673, 74 L.Ed. 1107, there is "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Certainly there can be no contention that a senile decision afforded this petitioner "some real opportunity to protect" his rights. If we might paraphrase part of the opinion in *Connecticut General Life Insurance Co. et al. v. Bryson,* supra, it might read "*** It would be unthinkable for this Court, *** to hold that it is bound by considerations of consistency, to perpetuate the senile decision."

In *Postal Telegraph Cable Co. v. City of Newport, Ky.,* 247 U.S. 464, 38 S.Ct. 566, 62 L. Ed. 1215, the first syllabus is "Where the state court denied asserted federal rights on a basis of fact having no support in the record, a finding of fact by the state court is not conclusive on the national Supreme Court, and it should review and correct the error."

Favors et al v. Randall et al., 40 F.., Supp. 743-747 reads: "**** any state action which denies to any person within its jurisdiction the equal protection of the laws runs afoul of the constitutional provision. *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664. As was said by the court in *Ex Parte Virginia,* 100 U.S. 339, 347, 24 L. Ed. 676, 'Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition.' and he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

In *Hallbrook et al v. Quinn et al,* 286 S.W. 954, (Tex.) the fourth syllabus reads: "Relief against judgment which is not void may be granted only by court in which it was rendered, in independent suit brought in such court for such relief."

Petitioner sought to correct the decision and filed his petition in Case No. 8083, in the District Court of Houston County, Texas and after special exceptions were sustained, appealed the same to the same Court which had theretofore rendered the senile decision, that is, the Court of Civil Appeals for the First Supreme Judicial District at Galveston, and soon thereafter the Supreme Court of Texas (R 73) transferred such case to the Court of Civil Appeals for the Tenth Judicial District at Waco, so as to take it out of the court which had theretofore rendered the senile decision, and thereby denied this petitioner his day in

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court, denied this petitioner his opportunity to have the same corrected in the Court of Civil Appeals at Galveston, and denied this petitioner due process of law and the equal protection of the laws.

In the Case of *Gryger v. Burke,* 68 S.Ct. 1256, 334, U.S. 728 92 L. Ed., 1083, rehearing denied 69 S.Ct. 13, the Supreme Court stated, that it could not treat "mere error" of state law as denial of "due process." We are not here concerned with "mere error." We have gone to the extreme. We have involved a decision which counsel on the opposite side states is "very senile, VERY SENILE."

SENILE OPINION OF GALVESTON COURT OF CIVIL APPEALS RESULTED IN ERRONEOUS DISPOSITION OF PETITIONER'S RIGHTS AND THEREBY DEPRIVED PETITIONER OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

Petitioner realizes that senility of opinion of Galveston Court is immaterial if it did not result in erroneous disposition of appeal. Therefore petitioner presents the following discussion for the purpose of showing that such senile opinion resulted in depriving him of his property without due process of law and denied him the equal protection of the laws of Texas.

References marked (App. - -)are to the pages in the Appendix, hereto attached and made a part hereof.

Paragraph 8 of the the contract (App. 48) provides that under certain circumstances respondents shall be paid 125% of the cost incurred by them in drilling, *completing* and abandoning the first and second wells drilled under said contract. Paragraph 10 of the

contract provides that under certain conditions petitioner would pay the contractors 125% of the cost and expense incurred in drilling, *completing* and equipping the first well drilled by the contractors and the drilling, *completing and* abandoning of the second well drilled under the contract. Paragraph 11 provides that under certain circumstances the contractors would be paid 150% of the costs and expenses incurred by them in drilling, *completing* and equipping the first two wells as producers and the cost of drilling, *completing* and abandoning the third well as unproductive. Paragraph 12 refers to the drilling, *completing,* equipping and abandoning of a well or wells drilled under the contract. Paragraph 13 provides for the doing of certain things after the contractors "have drilled *and completed* the four wells provided for in this agreement." (Emphasis supplied.)

Said provisions of the contract clearly show that drilling to the Woodbine sand is not the same thing as completing a well but, instead, there are two processes involved, one being drilling into the Woodbine sand and the other being completing the well after it has been drilled into the Woodbine sand.

Furthermore, in view of the fact that the contract clearly shows that the wells provided for therein were to be drilled for the purpose of testing the Woodbine sand for oil or gas, the portion of petitioners' fourth amended original petition quoted herein (App. 69) states the real meaning of the words "complete" and "completion" within the contemplation of the parties at the time they entered into said contract.

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Since the assignment, Exhibit "B," (App. 57) expressly provides "that this assignment is subject to all the terms, conditions, provisions and obligations set forth in said contract," it is necessary to construe said instruments together in order to determine the intention of the parties with respect to whether the assignment is conditional and if conditional, whether such condition is a condition precedent. Determining these questions should be as of the date on which the assignment was placed in escrow. The language quoted from the assignment in the first sentence of the parties to the assignment that any *condition* contained in the contract should be considered as being contained in the assignment the same as if such condition had been expressly stated in the assignment. Furthermore, paragraphs three and four of the contract show that the assignment was to be subject to the terms, *conditions* and provisions of the contract. Therefore, if the terms and provisions of the contract make the completion of the fourth well a condition precedent to the passing of title, then such condition precedent is contained in the assignment the same as if expressly stated therein.

Paragraph thirteen of the contract (App. 51) provides that if the "First Parties," contractor respondents, "drill the fourth well hereunder, upon the *completion* of said fourth well, First Parties shall have fully complied with all of their obligations hereunder and shall be entitled to receive, *without conditions,* assignments to a full undivided one-half interest" (emphasis supplied) in the leasehold and

other oil, gas and other mineral rights and estates involved in this suit. It is clear from this provision of the contract and from the contract as a whole that the only circumstance under which the assignment was to be "without conditions" was "upon the completion of said fourth well."

Furthermore, it is clear that the condition contained in said contract with respect to the completion of said fourth well is a condition precedent to the passing of title under the assignment. It is obvious in construing the contract from its four corners that the sole or primary consideration for the assignment of the undivided one-half interest, provided for in said contract, was the drilling, equipping and *completion* of the four wells. It is clear that the consideration for the drilling of less than four wells was to be the payment of 100%, 125% or 150% of the costs and expenses of drilling, equipping and completing said wells and that the sole or primary consideration for the passing of title under the assignment was the drilling, equipping and *completion* of the four wells. It is the general rule that if the performance of a condition is the sole or primary consideration for a conveyance such condition will be held to be a condition precedent. *Manton v. City of San Antonio,* 207 S.W. 951 (Er. Ref.); *Spinks v. First Christian Church of Vera,* 273 S.W. 815 (Tex. Com. of Apps.); *Spiller v. McGehee,* 68 S.W. 2d 1093 (Civ. Apps.) and *Clark v. Womack,* 142 S.W. 2d 954 (Dis. Jdgm. Cor.).

Respondents contend in their special exceptions

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that placing the assignment in escrow made the completion of the fourth well a mere obligation and kept it from being a condition of the assignment, and the Court of Civil Appeals held, in effect, that the intention manifest in the contract, that title should not pass until completion of the fourth well, was protected solely by the escrow agreement contained in the contract and expressly held that the contract is not reasonably subject to any construction other than that it was the intention of the parties that title should pass upon delivery of the assignment out of escrow.

The fact that the assignment was placed in escrow is immaterial to the determination of the question of whether the completion of the fourth well was a condition or a mere obligation. Such question is to be determined from a construction of the terms and provisions of the contract and assignment. Since the condition, contained in the contract, that the fourth well should be completed before title to the interests involved in this case passed to contractor respondents was expressly made a part of the assignment, even if the assignment had been delivered to the assignees therein, without ever having been placed in escrow, title to such interests would not have passed to the assignees until the fourth well was completed.

In the case of *Manton v. City of San Antonio,* 207 S.W. 951 (Er. Ref.), the court stated the applicable rule, at page 952, in the following language:

> "There is no exception to the rule that a deed cannot be delivered to the grantee as an escrow, but if delivered to him it becomes an operative

deed, freed from any condition *not expressed in the deed itself.*" (Emphasis supplied).

With respect to whether the intention of the parties that title should not pass until the completion of the fourth well was protected solely by the escrow agreement, petitioner points out the following facts which made protection against the passing of title upon delivery of the assignment out of escrow desirable. It is clear from the contract that contractor respondents intended to employ a "driling contractor" to do the actual work of drilling, equipping and completing the wells contemplated by the contract. The contract provides that the assignment should be delivered by the escrow holder upon being furnished two affidavits, one by the drilling contractor to the effect that contractor respondents had drilled and completed the four wells and the other by the contractor respondents to the effect that all bills for the drilling and equipping of said four wells had been paid. In view of these facts, it is reasonable to assume that it was the intention of the parties to make the completion of the four wells a condition precedent to the passing of title under the assignment as additional protection against the passing of title before completion of the four wells although such affidavits should be furnished and the assignment delivered out of escrow before all four wells were completed. However, regardless of the reason for the intention, construing the assignment and contract together for the purpose of ascertaining the intent of the parties at the time the assignment was placed in escrow, it is evident that it

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was the intention of the parties that delivery of the assignment out of escrow would not pass title under the assignment.

The condition precedent is expressed in the contract and it was so held by the Court of Civil Appeals in the following language: (App. 91) "The contract certainly intended that title should not pass until the completion of the fourth well. . . "

It is true that the contract reveals that the parties did not intend for the assignment to be delivered out of escrow before the completion of the fourth well, but it does not necessarily follow that it was the intention of the parties that delivering the assignment out of escrow would pass title under the assignment regardless of whether the fourth well had been completed. If this had been the intention of the parties, stipulating in the assignment "that this assignment is subject to all of the terms, *conditions,* provisions and obligations set forth in said contract" (emphasis supplied) would have been an idle act. This quoted language in the assignment cannot be thus ignored. Giving it effect results in the reasonable conclusion that it was the intention of the parties that title should not pass under the assignment until the completion of the fourth well. The contract and assignment merely gave the contractors the right to acquire title to such interests by performing such condition precedent.

In the case of *Spinks v. First Christian Church* (Tex. Com. Apps.), 273 S.W. 815, wherein a deed in

controversy was construed to contain a condition precedent, the court, at page 816, said:

> "In other words, the deed was lying dormant until it should be vitalized and given life by the performance of this condition precedent. The deed merely gave to this church this right to acquire title to this lot by doing a certain thing beforehand. It required affirmative action to bring the deed into being."

Petitioner alleged that the fourth well has never been completed (App. 94-96, 98-124, 127) and he is entitled to an opportunity to prove such allegation.

Obviously respondents' contention that, by reason of the fact that the assignment was delivered from escrow only after almost complete performance of the contract to drill and complete four wells, the assignment created only an obligation to complete the fourth well is the result of an attempt to ascertain the intent of the parties by construing the assignment as of the time when the assignment was delivered out of escrow and in view of the facts existing at that time. Likewise, the Court of Civil Appeals made an erroneous application of the holding in *Manton v. City of San Antonio,* 207 S.W. 951, by applying such holding as of a date subsequent to the drilling of the fourth well into the Woodbine sand the same as if the contract and assignment had come into existence at that time.

The time as of which the intent of the parties must be determined is the time when the contract and assignment came into existence. That time was not after

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"almost complete performance," (App. 89) and certainly at that time the Court of Civil Appeals would not have applied the rule that "where full value has been paid, the condition will not be considered a condition precedent." (App. 92) The rule that is applicable as of that time is the rule that if the performance of a condition is the sole or primary consideration for a conveyance such condition will be held to be a condition precedent.

The fact that the assignment was delivered to the assignees after almost complete performance of the contract to drill and complete four wells is immaterial. The completion of the fourth well was a condition precedent to the passage of title to the assignees, and in such case title does not pass until the condition is performed. Substantial performance is not sufficient. *Manton v. City of San Antonio,* 207 S.W. 951 (Er. Ref.), wherein, the court, after stating that a substantial performance of the terms of a condition would prevent a *forfeiture* of title, said, at page 952:

> "The law, much less equity, does not favor *forfeitures,* but, in the case of *conditions precedent,* it will not permit the title to pass until the condition is performed." (Emphasis supplied).

Having shown above that it was the intention of the parties that the completion of the fourth well should be a condition precedent to the passing of title under the assignment, the next logical question to be determined is whether such completion ever ceased to be a condition precedent, and if so, when it ceased to be such condition precedent.

The contention of respondents that petitioners' act in permitting the assignment to be released from escrow on the promise of the respondents to thereafter complete the fourth well constituted an acceptance by petitioners of an obligation to complete said well "in lieu of any condition in the original contract" and the holdings by the Court of Civil Appeals that appellants (App. 92) "accepted the promise of appellees to complete whatever was not completed and took such promise in satisfaction of the condition which attached to the escrow and caused the assignment to be delivered" and that petitioner's acceptance of the promise of respondents to complete the fourth well and causing the assignment to be delivered in reliance on such promise effected a transfer of title to respondents are untenable for two reasons.

First, there was no consideration for such substitute, or "in lieu," agreement. After the respondents elected to not abandon the contract when the first well was completed as a dry hole and thereafter drilled and completed the second and third wells as producers, they were bound and obligated to drill and complete the fourth well, and it is well settled that no consideration exists by virtue of an agreement to do that which the promisor is already bound to do by a valid and subsisting contract. *Barlow v. Cotulla* (Tex. Sup. Ct.), 173 S.W. 874; *McCall v. Texas Dragline Service Co., Inc.* (Galveston Civ. Apps.), 188 S.W. 2d 243, 246; *Sawyer v. Dixon* (San. An. Civ. Apps.), 143 S.W. 2d 987, 988; Contracts, sec. 81, 10 Tex. Jur. 139-140.

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Second, by reason of the fact that the agreement in question was not in writing, giving it the effect which respondents contend should be given it would violate Article 1288, Revised Civil Statutes of Texas which provides "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless than the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorized by writing."

It will be noted that the contract did not require petitioner to sign or make any statement as to the completion of any of the wells contemplated by said contract. Furthermore, the letter to Newby (App.) shows on its face that it was for the purpose of waiving the furnishing of the affidavits required by the contract. It is not contractual except as between petitioner and Newby, and it is contractual between them only to the extent that it evidences a waiver of the furnishing of the affidavits mentioned therein. The statement in the letter that the wells had been completed is nothing more than an admission of the receipt of the consideration for the passing of title under the assignment. It is analogous to a receipt for a money consideration. It may be explained or contradicted by parol evidence. Payment, sec. 45, 32 Tex. Jur. 720 et seq.

Petitioner has not found any decision directly in point, but submits the following excerpt from the opinion of Mr. Chief Justice McClendon in the case

of *Alexander v. Meredith* (Austin Civ. Apps., er. ref.), 262 S.W. 111, 112, as being a succinct statement of the fundamental principles of law applicable to the question now under discussion. In that case a receipt for money recited that such money was in payment for certain delay rentals under an oil lease. No attempt was made to show that the money was not received, but parol evidence was offered to contradict the recitals as to what the money covered, and the court said:

> "In the strict legal sense a receipt is merely a written admission of the existence of a fact, either prior to or at the date of the receipt. It is prima facie evidence of such fact, and when uncontradicted establishes it as a matter of law. But, like any other admission, it is not conclusive evidence of the fact admitted and may be explained, modified, or even contradicted by parol evidence.
>
> "But the mere form in which a writing may be drawn, or the name by which the authors or parties to it may designate it, do not necessarily determine its character. Hence, a writing in the form of a receipt, and so designated upon its face, may also embrace the terms of a contract, or agreement of the parties, and to that extent it becomes subject to the general rule that parol evidence is not admissible to vary a contract expressed in writing. Conversely a deed or written contract, whether or not it falls within the statute of frauds, may, and usually does, embrace recitals of fact which are not contractual in their nature; and in this regard they may be explained or contradicted by parol evidence.
>
> "These general principles are now well established both in this and other jurisdictions. Their

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application, however, to the infinite variety of instruments which have from time to time come up for consideration, has given rise to divergence of view in a number of particulars, among the several courts of last resort.

"A review of the many adjudications upon this subject would unduly extend this opinion, and in our judgment would not serve any useful purpose so far as elucidating the particular question before us. The following quotation from Wigmore on Evidence (par. 2432), which expresses a holding of practically universal acceptation, is, we think, directly in point as applied to the case at bar.

> 'When the writing itself the very act, as where it grants a discharge or release of a claim, or embodies a new obligation, it obviously falls within the rule, and its terms cannot be overthrown.'

"The writing before us not only acknowledged the receipt of a certain sum of money, but states how that sum of money is to be applied, namely, to the rentals on the lease contract up to June 24, 1923. It is true as alleged by appellees, that the lease contract did not bind the oil company absolutely to pay the designated rentals on or before June 24, 1922. But it does not follow that the language of the receipt applying the payment acknowledeged to have been received, to those specific rentals was any less a release of that obligation. Although optional with the lessee the obligation to pay or forfeit the lease existed, unless it were kept alive by the alternative option of drilling on the land. And even if, by virtue of its optional character, the payment of future rentals be regarded as no obligation at all, still, such payment, when made and accepted as such, carried with it a valuable right of extending the

lease automatically for another year. The payment, therefore, was in effect a grant of such extension. The receipt in terms, expressly made such grant, and to that extent, it was contractual and could not be contradicted by parol evidence. *In so far as the receipt merely acknowledged the payment of a designated sum of money, it was not conclusive.*

"But it was not sought to contradict its terms in this regard. That the money was paid was conceded. The evidence offered was for the purpose of showing that the sum so paid and acknowledged was understood and agreed by the parties at the time to be applied to another and different object or obligation—the down payment. We think clearly this could not be shown by parol in the absence of a showing of fraud or mistake in executing the release. *Whether the sum acknowledged was paid in whole or in part was a fact subject to parol proof;* but, the payment admitted, the agreement of the parties as to the application of that payment to the discharge of a specific obligation, either absolute or optional, or to whatever designated purpose, was a matter of contract, and the parties, having reduced that contract to writing, they must be governed by its express terms. It is not competent, we think, to show by parol that money receipted for is to be applied to an obligation or purpose different from that which the parties had in writing contracted that it be applied." (Emphasis supplied).

In the case at bar, petitioner is seeking to contradict the recited fact of the receipt of the consideration, and under the above authorities he may do so.

In the Contract, Exhibit "A", (App. 43) the word "complete" is used once, the word "completing"

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seven times, the word "completed" ten times and the word "completion" eight times, total twenty-six. For the court to hold that title passed before the COMPLETION of the fourth well makes it very easy to agree with Mr. King that such decision is "very senile, VERY SENILE."

In the appendix, which is attached hereto and made a part hereof, are the following exhibits:

Exhibit "A" Contract of July 14, 1943

Exhibit "B" Assignment

Exhibit "C" Letter

Exhibit "D" Fourth Amended Original Petition in Case No. 7773, District Court of Houston County, Texas.

Exhibit "E" Plaintiffs First Trial Amendment in Case No. 7773

Exhibit "F" Plaintiffs Second Trial Amendment in Case No. 7773

Exhibit "G" Defendants Special Exceptions in Case No. 7773

Exhibit "H" Court's Judgment in Case No. 7773

Exhibit "I" Opinion of Court of Civil Appeals at Galveston in Case No. 12,195

Exhibit "J" Petition in Case No. 8083, District Court, Houston County, Texas

Exhibit "K" Supplement to petition in Case No. 8083

Exhibit "L" Judgment of District Court in Case No. 8083

Exhibit "M" Opinion of Court of Civil Appeals at Waco, Texas

CONCLUSION

It is submitted that the foregoing clearly shows that there are special and important reasons for granting the petition for writ of certiorari, that the holdings of the courts below denied petitioner due process of law and denied petitioner the equal protection of the laws as guaranteed by Section I of the Fourteenth Amendment to the United States Constitution and that the decisions of the lower courts are not in accord with the applicable decisions of the Supreme Court of the United States. That in case this petition is insufficient for writ of certiorari, that, then and in that event it should be considered as a petition for writ of mandamus.

PRAYER

WHEREFORE, Petitioner prays that this Honorable Court allow this petition for writ of certiorari, directed to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco, to bring up the record in this case here to review the judgments of the District Court of Houston County, Texas and the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas at Waco and in the alternative that this Court issue a writ of mandamus to the Court of Civil Appeals for the First Supreme

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Judicial District of Texas at Galveston, ordering and directing such court to promulgate a sane decision in accordance with the findings of law and fact that it did find and holding as suggested on page 11 of the record "Applying this rule since it appears from appellants allegations that the contract required that the appellees drill, EQUIP AND COMPLETE four wells into the Woodbine sand, and it appears that this has NOT been done, it is necessary to construe the condition in the assignment as a condition precedent." and for such other relief, legal and equitable, to which petitioner may show himself entitled.

HARLAN GRIMES, *Attorney Pro Se*
Petitioner
Grapeland, Texas

CERTIFICATE OF SERVICE

I, Harlan Grimes, Petitioner, Attorney Pro Se, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of February, 1955, I served copies hereof on

Adams & Morgan
Citizens Bank Building, Crockett, Texas, and
Marshall, King & Jennings
P. O. Box 777, Graham, Texas

both of which firms of attorneys are attorneys of record for respondents, by mailing copies hereof in duly addressed envelopes, with first class postage

prepaid, same being within 500 miles of the residence of petitioner, to the above named attorneys.

HARLAN GRIMES, *Petitioner*
Attorney Pro Se
Grapeland, Texas

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APPENDIX

Exhibit "A"

THE STATE OF TEXAS,
COUNTY OF DALLAS.

THIS AGREEMENT, made and entered into this the 14th day of July, 1943, by and between A. G. TALBOT and E. T. MAYNARD, of Cook County, Illinois, hereinafter referred to as First Parties, and HARLAN GRIMES, of Houston County, Texas and RUSSELL W. GRIMES, of Williamson County, Texas, hereinafter referred to as Second Parties:

WITNESSETH:

1.

The Second Parties represent that they are the owners of a producing gas well having the capacity of producing 29,000,000 cubic feet per day by official Railroad Commission test, known as the Grimes No. 1-M. B. Ellis, together with the 7/8ths oil and gas leasehold estate in the land upon which said gas well is situated on the M. B. Ellis land in the John Daly Survey, Abstract No. 342, in Houston County, Texas, and that Second Parties have a good and marketable title to said leasehold interest, subject only to an obligation to pay the sum of $15,000.00 out of the proceeds of the sale of 5/8ths of all the gas produced and sold from said well. The Second Parties also represent that except for said $15,000.00 encumbrance above mentioned, the title to said well and the oil and gas lease is free and clear of all encumbrances and that all of

the costs and expenses of drilling, completing, and equipping said well have been fully paid. Before First Parties shall be required to commence the drilling of any well hereinafter provided, Second Parties will furnish First Parties sufficient evidence that the costs of drilling and equipping said M. B. Ellis gas well, including all sums due contractors, sub-contractors, day laborers, for fuel, water, pipes, tubing, and all equipment, connections and supplies have been fully paid.

2.

Second Parties further represent that they are the owners of valid commercial oil and gas leases covering up to this time not less than 4500 acres of land, including and surrounding said M. B. Ellis Tract, and that they have obtained unitization agreements from the owners of minerals and royalties in said block of 4074.2 acres. A description of all of said block of leases is set forth in a certain unitization agreement dated March 30, 1943, executed by Mrs. Vesta Johnson and Robert J. Johnson, her husband, and in a plat attached to said agreement, which plat is marked "Exhibit B" thereto; the oil and gas leases and the area covered by this agreement is included within the lines marked in red on said plat. Said unitization agreement and plat attached thereto are made a part of this agreement and marked "Exhibit A" for identification.

3.

In consideration of the undertakings of the First

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Parties as hereinafter set out to drill and equip four Woodbine sand wells on said block of leases, and subject to the other terms, conditions and provisions hereof, the Second Parties have sold, and hereby agree to convey, assign and transfer unto First Parties, an undivided one-half interest in and to all of the oil and gas leases now owned by the Second Parties in said area and block of leases in which said M. B. Ellis gas well is situated, together with an undivided one-half interest in and to any and all other leases which the Second Parties may hereafter acquire in said area, including an undivided one-half interest of the Second Parties in the M. B. Ellis gas well and the oil and gas lease upon which the same is situated, together with an undivided one-half interest in and to all equipment and personal property and fixtures situated on and used in connection with said lease, together with an undivided half interest in and to all of the rights of Second Parties under and by virtue of any and all unitization agreements, and any and all other agreements and contracts which the Second Parties have acquired or may hereafter acquire in connection with their oil and gas lease titles in said area.

4.

Before the First Parties shall be required to commence the drilling of the first well on said block, Second Parties agree to execute good and valid assignments in favor of the First Parties covering an undivided one-half interest in and to said block of leases, unitization agreements. etc., which assignments shall

be in acceptable form to be recorded in Houston County, Texas, and which assignments shall be subject to the provisions of this agreement. Said assignment shall be placed in escrow with Jerry B. Newby of Oklahoma City, Oklahoma with authority and instructions to deliver the same to First Parties when they have completed the drilling and completion of the fiurth well provided for in this agreement, and paid all costs thereof.

5.

The consideration for the sale and assignment by Second Parties to First Parties of an undivided one-half interest in the aforesaid properties is that the First Parties shall drill and equip, at their sole cost and expense, four wells, each of which shall be drilled at least 25 feet into the upper Woodbine sand formation which is found in this area at approximately 6,000 feet, unless oil or gas in paying quantities is, to the satisfaction of both parties, found in the Woodbine sand at a lesser depth, one of which wells, or the M. B. Ellis well, shall be used as an input well. The location of said four wells to be drilled by First Parties, unless both parties hereto mutually agree otherwise, shall be located on the following tracts:

One well on the H. C. Jones 152 acre tract in the J. M. Procela Survey;

One well on the W. L. Cook 62.8 acres in the Stephen Rogers Survey;

One well on the A. B. Spence 100 acre tract in the Stephen Rogers Survey; and

One well on the Malon Wright 50 acre tract in the Thomas Lively Survey.

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6.

The first of the four wells to be drilled by First Parties shall be commenced within 30 days from and after the date upon which a valid permit has been issued for the drilling thereof, and the titles to the oil and gas leases on the four tracts hereinabove described and the M. B. Ellis Tract have been approved by First Parties, and a contractor has been obtained to drill such well, and casing, tubing and other necessary equipment have been secured for such well and placed on the ground. If the title to all of the said four drilling tracts described in Paragraph 5 hereof, and the M. B. Ellis lease are found by First Parties' attorneys to be good and marketable, then, subject to the provisions and terms hereof, upon the completion of the first of the four wells to be drilled by First Parties, First Parties shall proceed with due diligence to drill the other three wells provided for in this contract, as permits, casing, tubing and other equipment can be obtained therefor.

7.

If the first well to be drilled by First Parties hereunder is, in the opinion of First Parties, a dry hole, or non-productive of oil or gas in paying quantities, First Parties shall have the right to abandon this contract, and upon such abandonment First Parties shall release and quit-claim to Second Parties all of their right, title and interest in and to all leases and other rights in the block except that First Parties shall retain and receive the proceeds of one-half of the 7/8ths

working interest production (subject to the $15,000.00 obligation mentioned in Paragraph 1 hereof) in the M. B. Ellis gas well now producing, until the First Parties have been reimbursed the actual cost of drilling equipment and abandoning said first well.

8.

If First Parties drill their second well on said block and the same is, in their opinion, a dry hole or non-productive, as provided for in Paragraph Number 7 above, First Parties shall, upon the completion of such well, have the right and option of abandoning this contract, in which event they will release and quit-claim unto Second Parties all of their right, title and interest in said properties, save and except the First Parties shall retain and receive the proceeds of one-half of the 7/8ths working interest production (subject to the $15,000.00 obligation mentioned in Paragraph 1 hereof) from the M. B. Ellis well now producing, until First Parties have received therefrom One Hundred Twenty-Five Per Cent (125%) of the cost incurred by First Parties in the drilling, completing and abandoning said well and the first dry hole mentioned in the preceding paragraph.

9.

If First Parties drill their third well on said block and the same is a dry hole or non-productive as hereinabove provided for, First Parties shall have the right thereupon to abandon this contract and be re-

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leased from further obligations hereunder, whereupon First Parties shall release and quit-claim unto Second Parties all of their right, title and interest in said block, save and except that the First Parties shall reserve and be entitled to receive the proceeds derived from one-half of the 7/8ths working interest production (subject to the $15,000.00 obligation mentioned in Paragraph 1 hereof) in the M. B. Ellis gas well now producing, until First Parties have recovered therefrom One Hundred Fifty Per Cent (150%) of the cost and expense incurred by First Parties in the drilling equipping, and abandoning of the three wells previously drilled.

10.

If the first well of the four wells to be drilled by First Parties is completed and equipped as a producer of oil, gas or distillate in paying quantities, but the second drilled by First Parties shall upon its completion be a dry hole or unproductive and abandoned by First Parties, and First Parties then elect to abandon this contract and be relieved of further obligations hereunder, First Parties shall be so relieved upon their releasing and quit-claiming unto Second Parties all of their right, title and interest in the properties save and except that First Parties shall retain and receive the proceeds of one-hlf of the 7/8ths working interest gas, distillate, oil or other production from the producing well previously drilled and completed by First Parties, and the M. B. Ellis well now completed (subject to the $15,000.00 obligation mentioned

in Paragraph 1), until First Parties shall have received from such proceeds One Hundred Twenty-Five Per Cent (125%) of the costs and expenses incurred by First Parties in the drilling, completing and equipping of the first well drilled by First Parties and the drilling, completing and abandoning of the second well drilled by First Parties.

11.

If the first and second of four wells to be drilled by First Parties hereunder shall be drilled, completed and equipped as producers of oil, gas or distillate in paying quantities, but the third well drilled by First Parties shall upon its completion be a dry hole or unproductive in paying quantities and abandoned by First Parties, and First Parties then elect to abandon this contract and be relieved of further obligations hereunder, First Parties shall be so relieved upon their releasing and quit-claiming unto Second Parties all of their right, title and interest in the properties, save and except that First Parties shall retain and receive the proceeds of one-half of the 7/8ths working interest gas, distillate, oil or other production from the first and second wells completed by First Parties as producers and the M. B. Ellis well now completed (subject to the $15,000.00 obligation mentioned in Paragraph 1) until First Parties shall have received from such proceeds One Hundred Fifty Per Cent (150%) of the costs and expenses incurred by First Parties in the drilling, completing and equipping of the first two wells drilled by First Parties as producers and

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the cost of drilling, completing and abandaning the third well as unproductive.

12.

The rights of First Parties to abandon this contract and be relieved of further liability hereunder after the completion of any dry hole or unproductive well as provided for herein, are optional with First Parties, and First Parties may exercise such option when any one or more dry holes or unproductive wells are completed. It is also understood that if First Parties shall elect to surrender and abandon this contract before they have drilled the four wells herein referred to and upon such surrender and abandonment of the contract First Parties are entitled to be reimbursed for One Hundred Per Cent (100%) of the cost, for One Hundred Twenty-Five Per Cent (125%) of the cost, or One Hundred Fifty Per Cent (150%) of the cost and expense incurred by First Parties in the drilling, completing, equipping and abandoning of a well or wells, the proceeds of the oil, gas, distillate or other production retained and to be received by First Parties from a producing well or wells as provided for herein, shall be paid direct to First Parties by the purchasers of the production. While First Parties are being reimbursed, First Parties agree to pay monthly to Second Parties, one-half of the actual expenses of operating any of said wells from which they are being reimbursed.

13.

If the First Parties drill the fourth well hereunder,

upon the completion of said fourth well, First Parties shall have fully complied with all of their obligations hereunder and shall be entitled to receive, without conditions, assignments to a full undivided one-half interest in all of the oil and gas leases, unitization agreements and other contracts pertaining to said block of leases, including the M. B. Ellis gas well now producing and the oil and gas leases covering same, and the escrow holder, Jerry B. Newby, is fully authorized and empowered to deliver such assignments to First Parties, or either of them, upon the First Parties or either of them, furnishing the said Newby with the affidavit of the drilling contractor to the effect that First Parties have drilled and completed the four wells provided for in this agreement, to the depths stipulated in Paragraph 5 hereof, and an offidavit of First Parties that all bills for the drilling and equipping said four wells, of which First Parties have knowledge, have been paid. In the event of the death of the said Jerry B. Newby, or of his refusal, inability, or failure to act as escrow agent for the parties, the successor of said Jerry B. Newby shall be chosen and appointed by mutual agreement of the parties hereto.

14.

Within fifteen days from date hereof, Second Parties will secure and deliver to First Parties at the office of Carey G. King, 1307 Kirby Building, Dallas, Texas, complete abstracts of title down to date covering the M. B. Ellis lease on which the present producing gas well is situated, and the H. C. Jones, 152 acre

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tract, the W. L. Cook 62.8 acre tract, the A. B. Spence 100 acre tract, and the Malon Wright 50 acre tract, hereinabove described. First Parties shall reimburse Second Parties the cost incurred by Second Parties of obtaining said abstracts and supplements; and if any defects are found in the title to either of said five tracts, the Second Parties shall make every effort to cure all of such defects which First Parties' attorneys may deem material. If the title to said M. B. Ellis tract, or either of the four other drilling tracts, or any other tract which the parties hereto may substitute for one or more of the four tracts above mentioned, are found to be defective or not good and marketable, and the same cannot be made good and marketable to the satisfaction of First Parties' attorneys within a reasonable time, then First Parties shall have the right to be released from any obligation under this contract. But if the titles to said five tracts, or any one or more tracts substituted by mutual agreement of the parties, are good and marketable, or made good and marketable by the Second Parties, then the First Parties shall proceed with the drilling of one of the four wells as provided for herein.

All of the oil and gas leases and unitization agreements held by the Second Parties up to the time of this contract shall be duly recorded and the expense of recording shall be borne equally by the Parties. The cost of any additional leases and the cost of recording any other instruments hereafter acquired shall be borne by the Parties fifty-fifty.

15.

From and after the time the First Parties commence the drilling of their first well hereunder, all expenses of operating the M. B. Ellis well and any other wells drilled on said block shall be borne by the parties in the proportion of their several interests in the block, and the Parties shall share in the production and revenues from said block in the proportion of their several interests in said block; and if the First Parties drill four wells on said block, as contemplated herein, the drilling of any further and additional wells shall be located and drilled by mutual consent of the parties and each of the parties hereto shall be responsible for one-half of the cost of drilling and equipping such additional wells.

16.

If any of the four wells to be drilled by First Parties shall be, upon completion, dry holes, or non-productive as herein stated, any and all pipe, tubing, or other equipment furnished by the First Parties shall remain the property of First Parties. But as to any and all wells drilled by First Parties which are completed and recognized as producers of oil or gas hereunder, the equipment in such wells shall be owned by the parties in proportion to their interest hereunder.

17.

If any operation permitted or required hereunder, or the performance if any covenant or agreement or

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requirement hereof is delayed or interrupted, directly or indirectly, by any past or future acts, orders, regulations, or requirements of the Government of the United States, or of any State or governmental body or any agency, officer, representative or authority of any of them, or because of delay or inability to get materials, labor, equipment or supplies, or on account of any other similar or dissimilar cause beyond the control of First Parties, the period of such delay or interruption shall not be counted against the First Parties, and this agreement shall automatically be extended for a reasonable time after the time such cause or causes for such delays or interruptions cease to exist, and the First Parties shall not be liable to Second Parties in damages for failure to perform any operation permitted or required hereunder, or to comply with any covenant, agreement or requirement hereof during the time First Parties are relieved from the obligations to comply with such covenants, agreements or requirements.

18.

If the First Parties acquire any additional oil or gas leases on lands within the area of the block of leases under consideration, such leases shall, at the option of Second Parties, be deemed as taken for the parties hereto in equal proportions upon Second Parties reimbursing First Parties for one-half of the cost of such leases within 30 days after First Parties tender Second Parties an assignment of one-half interest therein, together with an itemized statement of the cost of procuring such leases.

19.

The assignments to be executed in favor of First Parties by Second Parties of an undivided one-half interest in the properties mentioned in this contract and to be placed in escrow with Jerry B. Newby, or his successor, shall unless First Parties otherwise direct, be made to and in favor of the following persons:

An undivided 1/8th interest to E. T. Maynard
An undivided 1/8th interest to Betty V. Maynard
An undivided 1/8 interest to A. G. Talbot
An undivided 1/16th interest to Helen Talbot
An undivided 1/16th interest to Betty Talbot

WITNESS THE HANDS of the parties hereto, in quadruplicate, this the day and year first above written.

/s/ A. G. TALBOT
/s/ EDWIN T. MAYNARD
First Parties
/s/ HARLAN GRIMES
/s/ RUSSEL W. GRIMES
Second Parties

THE STATE OF TEXAS,
COUNTY OF DALLAS.

Before me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared A. G. TALBOT, E. T. MAYNARD, HARLAN GRIMES AND RUSSELL W.

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GRIMES, known to me to be the persons whose names are subscribed to the foregoing instrument, and they each acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this the 14th day of Juiy, 1943.

(NOTARY SEAL)

/s/ C. G. KING
Notary Public
Dallas County, Texas

Exhibit "B"

THE STATE OF TEXAS,
COUNTY OF HOUSTON.

KNOW ALL MEN BY THESE PRESENTS:

That we, Harlan Grimes, of Houston County, Texas, and Russell W. Grimes, of Williamson County, Texas, hereinafter referred to as "Assignors," for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration in hand paid by E. T. Maynard, Betty V. Maynard, A. G. Talbot, all of Cook County, Illinois, hereinafter called "Assignees," the receipt of which is hereby acknowledged, have bargained, sold, assigned and transferred and by these presents do hereby bargain, sell, assign and transfer unto the said Assignees (in the several pro-

portions hereinafter set out) an undivided one-half (½) interest in, to and of, whatever oil, gas and mineral leasehold interest and other rights and estates the said Assignors own or have title to, in, under and by virtue of the following oil, gas and mineral leases covering lands situated in Houston county, Texas, such leases and the lands covered and affected thereby being more particularly described as follows:

[Here is set forth descriptions of oil, gas and other mineral leases, such descriptions covering pages 2 to 22, inclusive (of the assignment).]

Reference is here made to all of the aforesaid oil and gas leases and the record thereof in the office of the County Clerk of Houston County, Texas, for a more particular description of the lands described in and embraced in said leases.

And for the same consideration the Assignors hereby grant, sell, assign and convey unto the said Assignees (in the several proportions hereinafter set out), an undivided one-half (½) interest in and to all and singular the rights, titles, interests and leasehold estates at this time or in the future acquired or owned by the Assignors or either of them in said lands, tenements and hereditaments appertaining to said lands, leases or leased premises under and by virtue of the aforesaid leases or any correction, amended or supplemental leases, extensions, renewals, contracts, unitization agreements or instruments of any character now or in the future had or obtained in connection with said leases, leasehold estates and premises, all, any or any part thereof; together with

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an undivided one-half (½) interest in and to all personal property, fixtures or improvements now or hereafter situated on or affixed to said property or any part thereof, and owned or used in the development and operation of said lands for oil, gas or other minerals.

TO HAVE AND TO HOLD the aforesaid interests, rights, titles and property unto the said Assignees, their heirs, legal representatives and assigns, subject to the terms and provisions of said leases, amendments, supplements, extensions, renewals, contracts, unitization agreements or other instruments pertaining thereto. It is expressly understood, however, that this assignment does not convey or cover any oil, gas or mineral royalty or mineral deeds or rights thereunder which the Assignors, or either of them, now own or might hereafter acquire in any of said lands.

And for the same consideration, the Assignors covenant with the Assignees that they are the lawful owners of the rights, interests and privileges hereby assigned and that they have good right and authority to make this assignment, and that they have not heretofore assigned or conveyed the same, and that except as hereinafter expressly set forth, they have not placed any encumbrance thereon.

It is further understood and agreed that this assignment is the same assignment referred to and contemplated in a certain contract in writing between the Assignors herein and E. T. Maynard and A. G. Talbot of date July 14, 1943, and that this assignment

is subject to all of the terms, conditions, provisions and obligations set forth in said contract; and that this assignment is made subject to that certain outstanding oil and gas payment mentioned in said contract of July 14, 1943, namely, the right of Talco Asphalt and Refining Company to receive the sum of $15,067.44 plus interest thereon at the rate of five per cent (5%) per annum from April 1, 1943, out of the proceeds of 5/8ths of 8/8ths of all the oil and gas in and under and that may be produced from the producing gas well now situated and completed on the M. B. Ellis 101-acre tract out of the Southwest part of the John Daly Survey, Abstract No. 342, which oil and gas payment is referred to in said contract of July 14, 1943, as being in the sum of $15,000.00.

It is understood that the Assignees are acquiring the undivided one-half interest in the aforesaid leases and leaseholds and personal property conveyed by this assignment, in the following several proportions:

E. T. Maynard ¼ A. G. Talbot ½
Betty Maynard ¼

It is understood between Harlan Grimes and Russell W. Grimes, that the one-half interest not conveyed by this assignment is owned and held by said Harlan Grimes and Russell W. Grimes, share and share alike.

IN WITNESS WHEREOF, the Assignors have hereunto set their hands, this the 26th day of August, 1943.

/s/ RUSSELL W. GRIMES
/s/ HARLAN GRIMES

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THE STATE OF TEXAS,
COUNTY OF HOUSTON.

BEFORE ME, a Notary Public in and for Houston County, Texas, on this day personally appeared HARLAN GRIMES, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this the 26th day of August, 1943.

(Notary Seal)

/s/ BEN R. BROOKS
Notary Public,
Houston County, Texas

THE STATE OF TEXAS,
COUNTY OF WILLIAMSON.

BEFORE ME, the undersigned authority, a Notary Public in and for Williamson County, Texas, on this day personally appeared RUSSELL W. GRIMES, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this the 31st day of August, 1943.

(Notary Seal)

/s/ A. F. PRIESMEYER
Notary Public,
Williamson County, Texas

Exhibit "C"

June 30, 1944

Mr. Jerry B. Newby
1816 N. W. 23rd Street
Oklahoma City, Oklahoma
Dear sir:

Referring to that certain escrow agreement of date September 24, 1943, between Russell W. Grimes and Harlan Grimes as First Parties and E. T. Maynard and A. G. Talbot as Second Parties and yourself as Third Party and escrow agent.

This will advise that the four wells specified in said escrow agreement to be drilled and equipped by the Second Parties on the block of leases in Houston County, Texas, have been completed to our satisfaction, and we are satisfied that all bills for the drilling and equipping of said four wells that have not been paid, if any, will be fortwith paid; and we hereby waive the making and furnishing you as escrow agent, any and all of the affidavits set forth in or implied in said escrow agreement as a condition to delivering to Messrs. E. T. Maynard and A. G. Talbot the assignment of leases, referred to therein and which you hold as escrow agent; and each of us do hereby authorize and direct you to deliver said assignment of date August 26, 1943, which you hold under the terms of said escrow agreement to Messrs. A. G. Talbot and E. T. Maynard by mailing the said assignment to their attorney, Mr. Carey G. King at the Republic Bank Building, Dallas, Texas. Upon your placing such assignment in the mail

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as herein directed, all of your duties and liabilities as escrow agent and as a party to said escrow agreement shall be fully terminated.

Yours truly,

HARLAN GRIMES
RUSSELL W. GRIMES

Exhibit "D"

NO. 7773

HARLAN GRIMES ET AL.	IN THE DISTRICT COURT
.VS.	OF HOUSTON COUNTY,
A. G. TALBOT ET AL.	3RD JUDICIAL DISTRICT
	OF TFXAS

PLAINTIFFS' FOURTH AMENDED ORIGINAL PETITION

TO SAID HONORABLE COURT:

Harlan Grimes and Russell W. Grimes, plaintiffs, present this their fourth amended original petition, which shall take the place and be in lieu of their third amended original petition and their "first trial amendment" filed in this cause, and complaining of E. T. Maynard in his individual capacity and in his capacity as survivor of the partnership composed of the late A. G. Talbot and said E. T. Maynard at the time of the death of said A. G. Talbot, and Betty V. Maynard, Helen Talbot, Albert G. Talbot, Jr., Helen Talbot Clark, Grover C. Clark, Elizabeth Talbot Hunt and Robert W. Hunt, and, in the alternative as hereinafter

alleged, E. W. Robitaille, as administrator with the will annexed of the estate of A. G. Talbot, deceased, defendants, for cause of action, would show the court:

1. That plaintiff Harlan Grimes resides in Houston county, Texas, and plaintiff Russell W. Grimes resides in Travis county, Texas; that all defendants except E. W. Robitaille, administrator, reside in Cook county, Illinois, and he resides in Young county, Texas; that on or about July 14, 1943, said E. T. Maynard and A. G. Talbot entered into the hereinafter alleged contract with plaintiffs, and in so doing they were acting as members of an ordinary partnership of which they were the only members; that at the time this suit was instituted said A. G. Talbot was alive and was a party defendant in this suit along with his partner, said defendant E. T. Maynard; that he is now dead and said E. T. Maynard is sued herein not only in his individual capacity but in his capacity as survivor of said partnership; that hereinafter said members of said partnership, which was composed of said A. G. Talbot and E. T. Maynard until the death of said A. G. Talbot, will be referred to as "contractor defendants"; that said A. G. Talbot left a will which has been duly admitted to probate; that said will disposed of all the estate of said decedent and no part of his estate passed to his heirs at law as such; that defendant Helen Talbot was his wife at the time of his death and for more than ten years prior thereto, and she and defendants Albert G. Talbot, Jr., Helen Talbot Clark and Elizabeth Talbot Hunt are all of the beneficiaries under his will; that defendant Grover C. Clark

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is the husband of said Helen Talbot Clark, and defendant Robert W. Hunt is the husband of said Elizabeth Talbot Hunt; that the alternative defendant, E. W. Robitaille, claims to be administrator with will annexed of the estate of said A. G. Talbot, deceased; that in the event he is not such administrator, then there is no representative of said estate who is authorized to represent said estate in litigation in Texas; that plaintiffs contend that he, as such administrator with will annexed of the estate of said A. G. Talbot, deceased, is neither a necessary nor a proper party to this suit; that unless it is finally determined that said Robitaille, as such administrator with will annexed, is a necessary party to this suit, plaintiffs ask that he be dismissed from this suit, and all references in this petition which might be construed as including him as a defendant are intended to include him only in the event it is finally determined that he is a necessary party to this suit.

2. That heretofore this suit was tried, and during such trial, to-wit, on June 28, 1949, plaintiffs filed herein an instrument, entitled "Plaintiffs' First Trial Amendment," wherein they conditionally discontinued this suit as to certain parties and conditionally disclaimed certain rights, titles and interests; that such discontinuance and disclaimer were conditioned upon its being finally determined that the "dead man's statute" is applicable in this suit; that prior to the filing of said instrument plaintiffs had begun to offer their original direct evidence and the court had ruled that by virtue of said statute certain proposed testi-

mony of plaintiffs, while they were testifying in their own behalf, was not admissible because such proposed testimony was with respect to transactions with said A. G. Talbot, then deceased; that it is the contention of plaintiffs that said statute is not applicable in this suit, and believing the filing of said instrument would make such testimony admissible even if the court did not err in excluding it, or at least would render it impossible for the court to commit reversible error by sustaining plaintiffs' said contention, and with the expectation that the court would admit such testimony on the part of plaintiffs, they filed said instrument; that there was no other consideration whatsoever for the execution and filing of said instrument; that after it was called to the court's attention, he continued to apply said statute the same as he did before it was filed, and thereupon, before announcing that they had completed offering their original direct evidence, plaintiffs asked leave to withdraw said instrument; that defendants objected to such action and the court refused to allow the withdrawal of said instrument, and thereupon, plaintiffs in open court announced that they then and there gave notice to all parties that they then and there revoked and cancelled said instrument to the full extent that they could do so and notified all parties to not rely on same; that no defendant did anything in reliance thereon and in no wise changed his or her position by reason thereof; that said trial resulted in a mistrial; that plaintiffs now ask that the fact issues raised by the foregoing allegations be determined and that the court hold and decree that said instrument is of no force or effect.

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3. That this suit involves the title to certain real estate and interests therein, particularly oil and gas leasehold interests, such real estate and interests being mentioned in the hereinafter mentioned contract and described in a certain purported assignment and transfer signed by said Harlan Grimes and Russell W. Grimes dated August 26, 1943, recorded in Book 223, Pages 409 to 420, inclusive, of the deed records of Houston county, Texas, wherein certain oil and gas leases are described, to which contract, purported assignment and transfer and oil and gas leases and records thereof reference is here made for better description of the lands and interests involved in this suit; that hereinafter said purported assignment and transfer will be referred to as "said assignment"; that a copy of said contract, with the exception of the exhibits attached thereto, is attached hereto and is designated as "Exhibit A"; that said contract is made a part of this petition, and notice is hereby given that the hereinafter mentioned record thereof will be offered in evidence at the trial of this case; that a copy of said assignment, with the exception of the descriptions of oil, gas and other mineral leases set out on pages 2 to 22, inclusive, thereof, is attached hereto and is designated as "Exhibit B"; that said assignment is made a part of this petition, and notice is hereby given that the above mentioned record thereof will be offered in evidence at the trial of this case.

4. That on and immediately prior to July 14, 1943, plaintiffs were the owners of the above mentioned leasehold interests and the oil and gas leases mentioned

in said assignment, and at said time they were the owners of a producing gas well situated on the land covered by one of said leases, such well being known as the Grimes No. 1-M. B. Ellis; that plaintiffs, being desirous of having other wells drilled on the lands covered by said leases for the purpose of exploring for and producing oil, gas and other minerals, entered into a contract with contractor defendants, dated July 14, 1943, now of record in Book 238, Page 434, Deeds Records of Houston county, Texas, under the terms of which said contractor defendants, subject to the hereinafter mentioned options to abandon said contract, bound and obligated themselves to drill, equip and complete four upper Woodbine sand wells on said block of leases, in consideration for which they were to receive, upon completion of the fourth well contemplated in said contract, an undivided one-half interest in the properties mentioned in said contract and said assignment; that under the terms and provisions of said contract it was agreed that said assignment should be executed by plaintiffs and place in escrow with Jerry B. Newby of Oklahoma City, Oklahoma, with authority and instructions to deliver the same to contractor defendants upon contractor defendants' furnishing him the affidavit of the drilling contractor to the effect that contractor defendants had drilled and completed said wells to the depths stipulated in Paragraph 5 of said contract, together with an additional affidavit of contractor defendants to the effect that all bills for the drilling and equipping of said four wells of which contractor defendants had knowledge had been paid.

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5. That contractor defendants drilled the first of said four wells and it was determined that it was "a dry hole, or non-productive of oil or gas in paying quantities" within the terms of said contract; that by reason thereof, under the terms and provisions of said contract, they had the right and option to abandon said contract and release and quit-claim to plaintiffs all their rights in said block except that they would be entitled to retain and receive the proceeds of one-half of the 7/8ths working interest production in said Grimes No. 1-M. B. Ellis gas well until contractor defendants were reimbursed the actual cost of drilling, equipment and abandoning said first well.

6. That upon the completion of said first well as a dry hole, contractor defendants did not elect to abandon said contract but, instead, drilled and completed the second and third wells of the four wells contemplated in said contract, and said second and third wells were "producers" within the terms of said contract; that by reason thereof, under the terms of said contract, contractor defendants were bound and obligated to drill and complete the fourth of said wells; that they drilled same but failed and refused to complete same and long since have abandoned the completion of said well; that within the contemplation of the parties to said contract, at the time they made and entered into same and in their dealings with respect to the performance of their obligations and the exercise of their options thereunder, the words "complete" and "completion" as applied to said fourth well meant that said well should not be deemed a dry hole until con-

tractor defendants had done all things which a reasonably prudent operator engaged in the same or similar business and under the same or similar circumstances would believe were reasonably necessary to preclude a reasonable belief that oil or gas would be produced in paying quantities through said well from the upper Woodbine sand penetrated by said well.

7. That after said well was drilled into the Woodbine sand contractor defendants, acting for themselves and defendant Betty V. Maynard, induced plaintiffs to permit said Newby to deliver said assignment to defendants by promising plaintiffs that they, contractor defendants, would thereafter complete said well; that plaintiffs relied upon said promise and in reliance thereon authorized said Newby, by means of a letter, a copy of which, marked "Exhibit C" is attached hereto and made a part hereof, to deliver said assignment to contractor defendants.

8. That contractor defendants were bound and obligated by said contract to complete said well; that as evidenced by said assignment itself, in that it provides that it is subject to all of the "terms, conditions, provisions and obligations set forth in said contract," such obligation was a condition precedent to the vesting in defendants of legal title to such undivided one-half interest in the properties described in said assignment and it was not intended that the delivery of said assignment to defendants by said Newby should have the effect of vesting in defendants legal title to same unless and until contractor defendans completed said fourth well; that in the event it should be held that such deliv-

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ery had the effect of vesting in defendants legal title to such one-half interest in said properties in addition to such equitable title as they theretofore may have had by virtue of said contract, contractor defendants were bound by an implied provision of said contract to complete the said fourth well within a reasonable time; that a reasonable time for the completion of same has passed; that they failed to complete said well within a reasonable time; that defendants' titles, if any, in and to said properties were subject to being defeated, at the election of plaintiffs, by the failure of contractor defendants to complete said fourth well within a reasonable time; that plaintiffs have exercised their right of election to declare a forfeiture by defendants of all of their interests in said properties except contractor defendants are entitled to payments from the proceeds derived from one-half of the seven-eighths working interest production from said Grimes No. 1-M.B. Ellis well and the two producing wells drilled by contractor defendants as hereinafter alleged.

9. That said contract and assignment and the records thereof now constitute clouds upon plaintiff's title to said properties, and they are entitled to judgment of the court removing such clouds from their title except to the extent that contractor defendants are entitled to payments from the proceeds of production from said wells as hereinafter alleged; that such clouds on plaintiffs' title to said properties are hindering and impeding the free and unincumbered alienation by plaintiffs of their title in and to said properties and will continue to hinder and impede the free

and unincumbered alienation thereof by plaintiffs unless and until such clouds are removed and plaintiffs' said title in and to said properties is quieted in them.

10. That contractor defendants are entitled to receive from the proceeds derived from one-half of the seven-eighths working interest production from said Grimes No. 1-M. B. Ellis well and the two producing wells drilled by contractor defendants, as above alleged, reimbursement to the extent of the costs and expenses incurred by contractor defendants in the drilling, completing and abandoning of said first well drilled by them and the drilling, equipping and completing of the second and third wells drilled by them, as alleged above, plus 50% thereof; that contractor defendants have never furnished plaintiffs with proof of the amount of the costs and expenses incurred by them in the drilling, completing and abandoning of said first well and the drilling, equipping and completing of said second and third wells, and plaintiffs now demand proof of such costs and expenses; that notwithstanding the fact that defendants have never furnished plaintiffs with proof of the amount of such costs and expenses, plaintiffs have paid unto defendants from the proceeds derived from one-half of the seven-eighths working interest production from said producing wells the sum of $114,600.21 and they are now ready, able and willing to pay the balance, if any, necessary to cover the full 150% of such costs and expenses; that notwithstanding said contract provides that until defendants receive such 150% of such costs and expenses they shall bear or pay one-half of the

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actual expenses of operating any of said wells from which they are being reimbursed and paid, plaintiffs, being desirous of disposing of their said indebtedness to defendants at the earliest practicable time, have disregarded said provision of said contract and have not deducted defendants' one-half of such operating expenses.

11. In the alternative, in the event it is determined that defendants have acquired irrevocable title to one-half interest in the oil, gas and other mineral lease-hold estates involved in this litigation, plaintiffs are entitled to recover from defendants one-half of all costs and expenses incident to placing said leases on production and the production and marketing of gas and derivatives thereof, including, among other things, the sum of $750.00 per month as a reasonable compensation to plaintiff Harlan Grimes for his services in managing said operations and costs and expenses incident to efforts to place the third well drilled under said contract back on production after it ceased producing

WHEREFORE, premises considered, plaintiffs pray that, on final hearing hereof, they have judgment against the defendants and each of them in every capacity in which they are sued herein cancelling and holding for naught said assignment and record thereof, cancelling and holding for naught said contract and record thereof except to the extent that said contract evidences the right of defendants to payments as alleged above, removing the above alleged clouds from plaintiffs' title to the properties involved herein,

quieting in plaintiffs title to the properties involved herein, decreeing the aggregate amount of payments to which defendants are entitled after deducting the amounts paid to them from the proceeds of the production from said Grimes No. 1-M. B. Ellis well and the second and third wells drilled by contractor defendants as alleged above; that, in the alternative, in the event it is determined that defendants have acquired irrevocable title to one-half interest in the oil, gas and other mineral leasehold estates involved in this litigation, plaintiffs recover from defendants one-half of all costs and expenses alleged in the foregoing paragraph eleven above; and in all events plaintiffs further pray that they recover of and from defendants, jointly and severally, all costs in this behalf expended and for such other and further relief, at law and in equity, general and special, to which they may show themselves justly entitled.

GRIMES & OWEN
Taylor, Texas
By: E. M. Grimes
Attorneys for Plaintiffs

Copies of the foregoing amended petition have been mailed to Messrs. Marshall & King, Graham, Texas, and Messrs. Adams & Morgan, Crockett, Texas Attorneys for defendants.

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Exhibit "E"

NO. 7773

HARLAN GRIMES ET AL.	IN THE DISTRICT COURT
VS.	OF HOUSTON COUNTY,
A. G. TALBOT ET AL.	TEXAS, THIRD JUDICIAL DISTRICT

PLAINTIFFS' FIRST TRIAL AMENDMENT AT TRIAL WHICH COMMENCED JANUARY 23, 1950.

TO SAID HONORABLE COURT:

Now come the Plaintiffs, Harlan Grimes and Russell W. Grimes and with leave of the Court first had and obtained, after announcing ready for trial and the presentation by the Defendants and Intervenors of their Special Exceptions and before agrument thereof and before any ruling thereon by the Court, present this their First Trial Amendment at the trial of this case, which commenced on January 23, 1950, and would show the Court:

That Exhibit "C," to-wit: A copy of a letter signed by Harlan Grimes and Russell W. Grimes addressed to one Jerry B. Newby, dated June 30, 1944, was attached to and made a part of Plaintiffs' Fourth Amended Original Petition, for the purpose of showing the wording of an instrument, which was executed by these Plaintiffs in reliance upon a promise made by A. G. Talbot and E. T. Maynard that the fourth well drilled under the contract in question, to-wit, the Mills well, would be thereafter completed; that Plaintiffs in no manner rely upon said letter,

but instead, present same for the purpose of showing that the statement therein to the effect that said Mills well had been completed to their satisfaction, was not true and that said Talbot and Maynard knew at the time said letter was signed and at the time it was delivered by these Plaintiffs, that said statement was not true and that said Mills well had not been completed to the satisfaction of these Plaintiffs.

GRIMES & OWEN
By: /s/ E. M. Grimes
Attorneys for Plaintiffs

Exhibit "F"
NO. 7773

HARLAN GRIMES ET AL.	IN THE DISTRICT COURT OF
VS.	HOUSTON COUNTY, 3RD
A. G. TALBOT ET AL.	JUDICIAL DISTRICT OF TEXAS

PLAINTIFFS' SECOND TRIAL AMENDMENT AT TRIAL WHICH COMMENCED JANUARY 23, 1950

TO SAID HONORABLE COURT:

Plaintiffs, Harlan Grimes and Russell W. Grimes, with leave of court first having been obtained, after the court sustained special exception No. IIIa presented by defendants and cross plaintiffs, present this their second trial amendment at the trial which commenced January 23, 1950, and hereby allege that they are ready, able and willing and do hereby offer to do equity with respect to the costs and expenses

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incurred by A. G. Talbot and E. T. Maynard in drilling, equipping and attempting to complete the fourth well drilled by them under the contract involved in this suit; that plaintiffs are now ready, able and willing and offer to pay to defendants an amount in money sufficient to fully compensate them for any and all expenses and costs incurred and work done by said A. G. Talbot and E. T. Maynard in drilling, equipping and attempting to complete said well so far as same were or are of any use or benefit to these plaintiffs, and now request the court to determine the amount necessary to do so.

GRIMES & OWEN
TAYLOR, TEXAS
By: /s/ E. M. Grimes
Attorneys for Plaintiffs

Exhibit "G"

HARLAN GRIMES ET AL. vs. A. G. TALBOT ET AL. No. 7773

IN THE DISTRICT COURT OF HOUSTON COUNTY, TEXAS. A. D. 1949

TO THE HONORABLE JUDGE OF SAID COURT:

Now come defendants, . . . and would represent and show to the court as follows:

. . .

IIIa.

Now come the defendants and cross-plaintiffs, and specially except to plaintiffs' fourth amended original petition, and except to the same for the reason that

said pleading shows on its face and incorporates within its terms two documents, one being the contract referred to in their pleadings as Exhibit A and the other being an assignment referred to and made a part of their pleadings as Exhibit B:

(1) The said contract specifically provided within its own terms for the execution and delivery of the said assignment and the said contract specifically providing within its own terms that the said assignment shall be without conditions, and that such assignment shall be delivered by the escrow agent as therein provided for. The assignment so plead by plaintiffs is in the form of an unconditional assignment, the only language therein not found in the ordinary form of assignment being the reference therein as follows: "It is further understood and agreed that this assignment is the same assignment referred to and contemplated in a certain contract in writing between the assignors herein and E. T. Maynard and A. G. Talbot of date July 14, 1943, and that this assignment is subject to all of the terms, conditions, provisions and obligations set forth in said contract; . . ." This language in the assignment cannot make the assignment a conditional one because it embodies the original contract plead as plaintiffs' Exhibit A and the most specific reference in said contract as plead is that the assignment shall be without conditions. Therefore the pleadings of plaintiffs constitute on their face a pleading that the assignment which they attack is an unconditional assignment, and being unconditional cannot be cancelled or held to be a cloud and removed

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as a cloud on the pleadings made of the plaintiffs. The assignment being shown by plaintiffs' pleadings to be unconditional cannot be attacked, as plaintiffs seek to do, by seeking to prove that an alleged condition has not been performed, or otherwise.

(2) And for the reason that if there is any language in said assignment sufficient to create either a condition or a covenant, therein, that it can only be the quotation from said assignment set forth in immediately preceding subparagraph (1), it not being admitted that said language is sufficient for either, but if sufficient for either can create only an obligation for the reason that the remainder of the pleadings of plaintiffs show that such instrument was escrowed, that it was delivered only after what by their own pleadings is almost complete performance, and according to their own pleadings because of the express acceptance of a contractual obligation to complete what they plead is performance in lieu of any condition in the original contract.

(3) That if said assignment is conditional, it can only be through the quotation therefrom set forth in said subparagraph (1) above, it being denied that such language does create a condition in said assignment, but if so, it can only be a condition subsequent, plaintiffs' pleadings showing that said assignment was legally delivered after and out of escrow to the defendants, that the consideration therefor has been at least in most part performed, and that plaintiffs have in writing contracted with and represented to the escrow agent that said consideration has been

fully performed, this rendering it legally impossible for them to attack the assignment now, as they seek to do, claiming non-performance of the same consideration covered by their said written document, it being that plead by plaintiffs as Exhibit C.

Of which special exceptions and each of them these defendants and cross-plaintiffs pray judgment of the court.

Marshall and King
By: /s/ B. W. King
Adams and Morgan
Attorneys for Defendants

Exhibit "H"

NO. 7773

HARLAN GRIMES, ET AL
vs.
A. G. TALBOT, ET AL

IN THE DISTRICT COURT OF HOUSTON COUNTY, TEXAS, THIRD JUDICIAL DISTRICT.

DECREE

On the 23rd day of January, 1950, the above numbered and entitled cause, . . . came on regularly for trial, and all of said parties, by and through their attorneys of record, announced ready for trial. . . .

The defendants then presented their special exceptions Nos. IIIa (1), IIIa (2) and IIIa (3), in that order, and leave of Court having been obtained, plaintiffs presented and filed their first trial amendement

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at this trial, and the Court having considered said special exceptions IIIa (1), IIIa (2) and IIIa (3), announced that it was his opinion that each and all of said three special exceptions should be sustained, and they and each of them are hereby sustained, to which action of the Court plaintiffs then and there, in open court, excepted; and thereupon, leave of Court having been granted, plaintiffs presented and filed their second trial amendement at this trial. Thereupon, defendants again presented each and all of their above mentioned pleas and exceptions, to-wit, said pleas to the jurisdiction and non-joinder of parties and said special exceptions Nos. IIIa (1), IIIa (2) and IIIa (3), and the Court again overruled said pleas to the jurisdiction and non-joinder of parties for the same reason as when before presented, to which action of the Court the defendants again, in open court, excepted, and the Court again sustained said special exceptions, Nos. IIIa (1), IIIa (2) and IIIa (3), to which action of the Court the plaintiffs again, in open court, excepted.

The defendants then presented their pleas of limitation which are in the form of special exceptions to the pleadings, being those set forth in paragraphs IV, V, VI, VII, VIII, AND IX, and the Court having considered said pleas of limitation as special exceptions to the pleadings of the plaintiffs is of the opinion that they, and each of them, should be overruled, and they and each of them are hereby overruled, to which action of the Court defendants, in open court, excepted.

Thereupon, leave of Court having been granted, defendants and cross-plaintiffs presented and filed their First Trial Amendment at this trial, the intention of such pleading being to assert an action against plaintiffs and cross-defendants, Harlan and Russell W. Grimes, for a half interest in a certain assignment from one Jerry B. Newby to said cross-defendenats.

Thereupon, plaintiffs, acting by and through their attorneys of record, announced in open court, that they desired to take a non-suit with regard to their alternative action set forth in Paragraph 11 of their Fourth Amended Original Petition without prejudice, the special exceptions IIIa (1), IIIa (2) and IIIa (3) of defendants not being levelled thereat, provided they could do so without danger that their said alternative action would, by virtue of said dismissal, be endangered by any statue of limitation;

Thereupon the defendants and cross-plaintiffs, acting by and through their attorneys of record, announced and then and there agreed that plaintiffs might take the desired non-suit as set forth in the preceding paragraph hereof with the understanding and agreement on the part of defendants and cross-plaintiffs that all statutes of limitations have been and would be tolled from the date of filing by plaintiffs of the first pleading in which such alternate action was first asserted in this case until sixty days after final termination of any appeal from this judgment;

The cross-plaintiffs, being all of the defendants herein except Helen Talbot, acting by and through

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their attorneys of record, announced in open court that they desired to take non-suits with regard to their action set forth in their first trial amendment filed at this trial and the actions set forth by them in the following sections of their said Third Amended Original Answer and Cross-Action, such sections being Nos. XVII and the first section XIX, there being two sections in said pleading designated at XIX, without prejudice, provided they could do so without danger that their said actions would, by virtue of said dismissals, be endangered by any statute of limitations;

Thereupon the plaintiffs and cross-defendants, acting by and through their attorneys of record, announced and then and there agreed that cross- plaintiffs might take the desired non-suits as set forth in the preceding paragraph hereof with the understanding and agreement on the part of the plaintiffs and cross-defendants that all statutes of limitations have been, and would be, tolled from the date of the filing by cross-plaintiffs of the first pleading or pleadings in which such actions, respectively, were first asserted in this case until sixty days after final termination of any appeal from this judgment;

Thereupon all of the parties to this suit, acting by and through their attorneys of record, having bound and obligated themselves to abide by said agreements and understandings, announced that they desired to discontinue their said alternative action and actions, respectively, in this suit and requested the Court to dismiss same without prejudice: accordingly it is

ORDERED, ADJUDGED AND DECREED by the Court that the above mentioned alternative action and actions of plaintiffs and cross-plaintiffs, respectively, be, and they are hereby dismissed from this suit without prejudice.

Thereupon plaintiffs announced in open court that they elected to stand on their said Fourth Amended Original Petition, as amended by their said First and Second Trial Amendments, and with the deletion of the above mentioned paragraph 11 thereof, and the Court being of the opinion that by reason of said election and the sustaining by the Court of defendants' said special exceptions Nos. IIIa (1), IIIa (2) and IIIa (3), plaintiffs' suit should be dismissed, it is

ORDERED, ADJUDGED AND DECREED by the Court that plaintiffs' suit be, and it is hereby dismissed at their costs, and that defendants recover of and from plaintiffs all their costs in this behalf expended, for which let execution issue. To which action and judgment of the Court plaintiffs then and there, in open court, excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, and requested the Court to fix the amount of the supersedeas bond to be filed by plaintiffs as such appellants, and the Court does hereby fix such bond in the principal sum of $10,000.00.

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SIGNED AND ORDERED ENTERED this the 24th day of January, 1950.

/s/ V. M. Johnston
Judge, Third Judicial
District of Texas

Exhibit "I"

HARLAN GRIMES ET AL, APPELLANTS
NO. 12195 v.
A. G. TALBOT ET AL, APPELLEES

Appeal from the District Court of Houston County

This is an appeal from a judgment dismissing appellants' suit when the court sustained appellees' special exceptions to appellants' fourth amended original petition and trial amendments thereto, and appellants refused further to amend.

By their pleadings appellants sought the cancellation of their written assignment of an undivided half interest in a block of oil and gas leases located in Houston County to appellees, which assignment was dated August 26, 1943. The assignment purports to have been executed by appellants pursuant to their written contract with appellees dated July 14, 1943. Appellants made no contention that the assignment was executed through fraud, accident, or mistake, but they pled (1) that there was no lawful delivery of the assignment to appellees, and (2) that if there was

such delivery, the assignment never became effective to transfer the title to the undivided half interest in the leases because the transfer was made subject to a condition precedent, which condition or event never occured.

Appellants attached to their pleadings as exhibits and pled fully the copy of the aforesaid contract of July 14, 1943, and a copy of the aforesaid assignment. Appellants also attached to their petition as Exhibit "C" a copy of a letter from them to the escrow agent, dated June 30, 1944, directing him to deliver the assignment to appellees and informing him that the four wells which appellees were to drill had been completed to appellants' satisfaction.

The contract of July 14, 1943, is lengthy, but for present purposes it is sufficient to say that by its terms appellees were bound to drill into the Woodbine sand, and to equip and complete, four wells. The Woodbine sand was found at the location of the leases at about a depth of 6,000 feet. Paragraph 3 of the contract provides that in consideration of appellees undertaking to so drill and equip four wells "and subject to the other terms, conditions and provisions hereof Second Parties (appellants) have sold and hereby agree to convey, assign and transfer unto First Parties an undivided ½ interest * * *."

Paragraph 4 of the contract provides that before appellees shall be required to begin drilling operations, appellants shall execute assignments to appellees of an undivided ½ interest "which assignments shall be subject to the provisions of this agreement." The

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paragraph further provides that the assignment shall be placed in escrow with Jerry B. Newby "with authority and instructions to deliver the same to First Parties when they have completed the drilling and the completion of the fourth well provided for in this agreement, and paid all costs thereof."

Paragraph 13 provides "if the First Parties drill the fourth well hereunder, upon the completion of said fourth well First Parties shall have fully complied with all of their obligations hereunder and shall be entitled to receive without conditions assignments to a full undivided ½ interest * * * and escrow holder Jerry B. Newby is fully authorized and empowered to deliver such assignments to First Parties * * * upon the First Parties * * * furnishing the said Newby with the affidavit of the drilling contractor * * * that the First Parties have drilled and completed the four wells * * *," and that all costs have been paid.

Exhibit "C" to appellants' pleadings, being a letter to the escrow agent, notified the escrow agent that the four wells specified in the escrow agreement had been drilled and equipped by appellees to appellants' satisfaction and appellants stated that they were satisfied that all bills for the drilling and equipping of the said four wells that had not been paid, if any, would be forthwith paid "and we hereby waive the making and furnishing you as escrow agent any and all of the affidavits set forth in or implied in said escrow agreement as a condition to delivering" the assignment. With respect to said letter to the escrow agent, appellants alleged in their first trial amend-

ment that Exhibit "C" was attached to their fourth amended original petition for the purpose of showing the wording of the said letter from appellants made "in reliance upon a promise made by (appellees) that the fourth well * * * would be thereafter completed; that plaintiffs in no manner rely upon said letter but instead present same for the purpose of showing that the statement therein, that said Mills well had been completed to their satisfaction, was not true and that (appellees) knew at the time said letter was signed and at the time it was delivered by these plaintiffs that said statement was not true and that said Mills well had not then been completed to the satisfaction of these plaintiffs."

Appellants alleged in their pleadings that after the fourth well was drilled to the Woodbine sand, the appellees induced them to permit the assignment to be delivered from escrow by promising appellants that they, appellees, would thereafter complete said fourth well.

It may be added that appellants' pleadings show that the assignment was placed of record and that under the terms of the contract of July 14, 1943, appellants were to participate in the payment of the cost of recording same and the inference is that this was done. It further appears that this suit was filed by appellants in 1947.

Appellants predicate their appeal upon six points, complaining of the action of the court in sustaining the special exceptions to their pleadings, because (1) the pleadings do not show on their face that the assign-

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ment is an unconditional assignment or if conditional such condition is only a condition subsequent; (2) that the placing of the assignment in escrow did not create only an obligation on appellees to complete the fourth well; (3) that the fact appellants' pleadings show the assignment was delivered from escrow only after almost complete performance of the contract to drill and complete the four wells did not create an obligation as distinguished from a condition to complete the fourth well; (4) that appellants' pleadings did not show appellants accepted an obligation to complete the fourth well instead of the condition that it should be completed before title to the half interest in the mineral rights passed in this assignment; (5) that appellants can claim that the fourth well was not completed, notwithstanding the assignment was delivered out of escrow pursuant to a written instrument signed by appellants wherein it was represented the fourth well had been completed. The sixth point is broad enough to embrace the five points just indicated.

We overrule appellants' points.

The effect of the action of the trial court in sustaining appellees' special exceptions is to hold that appellants' pleadings were not sufficient to show (1) that there had not been a lawful delivery, or (2) that appellants were entitled to have the assignment canceled. For the purpose of testing the correctness of the trial court's action, which in effect amounted to the sustaining of a general demurrer, the allegations of appellants' pleadings must be taken as true.

It appears from appellants' allegations that they directed the escrow agent to deliver the assignment, stating in connection therewith that the four wells had been completed to their satisfaction; and it further appears from said allegations that the assignment was delivered, and duly recorded. It is clear that the delivery was a lawful one, and appellants do not here claim otherwise, they content themselves, as we understand them, with the contention that the assignment was made upon the condition precedent that the fourth well must be completed. The assignment, as indicated above, was attached to appellants' pleadings as an exhibit, and fully pled. The assignment is in usual form down to and including the habendum clause. Following the habendum clause comes appellants' covenant that they are the owners of the property therein assigned, and that they have good right and authority to make the assignment, and that they have not theretofore assigned or conveyed the same. Then comes this language, which appellants contend constitutes the full completion of the fourth well a condition precedent to the passing of the title, to wit:

"It is further understood and agreed that this assignment is the same assignment referred to and contemplated in a certain contract in writing between the assignors herein" and appellees "of date July 14, 1943, and that this assignment is subject to all of the terms, conditions, provisions and obligations set forth in said contract; * * *."

As appears above, the contract provided, in paragraph 13, that completion of the fourth well consti-

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tuted a full compliance with all of appellees' obligations and that they "shall be entitled to receive without condition" the assignment. The escrow agreement protected appellants, and it was so intended, until appellees had fully complied with their obligations. "Whether a covenant is to be deemed precedent or subsequent depends upon the intention of the parties as shown by the instrument, and not upon the use of any particular set of technical words." Devlin on Deeds, 3rd Series, Vol 2, 1779, Sec. 958. There is nothing in the language of the assignment which in and of itself would show that the completion of the fourth well was made a condition precedent to the vitality of the assignment. Of course, under appellants' pleadings it must be taken as true that the fourth well lacked something of completion, though it appears from said pleadings that it was drilled to the Woodbine sand. It also appears from said petition that the three other wells were fully completed.

Since it does not appear from the assignment that the full completion of the fourth well was a condition precedent, it must be made to appear by appellants from the contract that the completion of the fourth well was a condition precedent to the passing of title. The contract certainly intended that title should not pass until the completion of the fourth well, and this was protected against by an escrow agreement. But there is nothing in the contract to show any intention that title should not pass upon the delivery of the assignment out of escrow, but, to the contrary, the contract is not reasonably subject to any other construction.

It was held in Manton v. City of San Antonio, 207 S.W. 951, 952, writ refused, "The general rule is that if the grant is without other consideration than the performance of the specified precedent, and the converse of the proposition must be just and beneficient, and where there have been other considerations performed, and especially where full value has been paid, the condition will not be considered a condition precedent, but will have applied to it the rules applicable to conditions subsequent." Applying this rule, since it appears from appellants' allegations that the contract required that appellees drill four wells into the Woodbine sand, and it appears that this has been done, it is necessary to construe the condition in the assignment, if a condition it is, as a condition subsequent. Furthermore, it appears from appellants' pleadings that they accepted the promise of appellees to complete whatever was not completed and took such promise in satisfaction of the condition which attached to the escrow and caused the assignment to be delivered.

Whether appellants would be entitled in any event to the remedy of cancellation, in the absence of any allegations of fraud, accident or mistake, or the showing of some equity in appellants, has not been here presented, nor has it been considered by us.

The judgment is affirmed.

(S) T. H. Cody
Associate Justice

Judgment rendered and opinion filed July 27, 1950.

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Exhibit "J"

HARLAN GRIMES		IN THE DISTRICT COURT
VS	NO. 8083	OF HOUSTON COUNTY, TEXAS
EDWIN T. MAYNARD ET AL		THIRD JUDICIAL DISTRICT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Harlan Grimes, who resides in Grapeland, Houston County, Texas, and complaining of E. T. Maynard, sometimes known as Edwin T. Maynard, and wife, Betty V. Maynard, who reside at 969 Hill Road, Winnetka, Cook County, Illinois, E. W. Robitaille as Administrator with the Will Annexed of the Last Will and Testament of A. G. Talbot, deceased, who resides in Graham, Young County, Texas, Albert G. Talbot, Junior, who resides at 1612 Tyler Street, Amarillo, Potter County, Texas, Helen Talbot Clark and husband Grover C. Clark, who reside at 201 Birdwood Road, Akron, Summitt County, Ohio, Elizabeth Talbot Hunt and huband Robert A. Hunt, who reside at 1042 North Sheridan Road, Chicago, Illinois, and for cause of action plaintiff would represeint and show to the Court as follows, to-wit:

I.

Plaintiff would represent and show to the Court that heretofore in July 1947 there was filed in the District Court of Houston County, 3rd Judicial District of Texas, in Case No. 7773, a petition in which Harlan Grimes and Russell W. Grimes were plaintiffs and A. G. Talbot, E. T. Maynard and Betty V. Maynard were defendants; that thereafter plaintiffs filed therein their fourth amended original petition; that

special exceptions were sustained thereto by the District Court of Houston County, Texas, and a transcript of same was filed in the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston and the same was docketed therein as Case No. 12,195. Reference is hereby made to the record in said Case No. 12,195 and the same is made a part hereof as if set out herein in full.

II.

Plaintiff would show to the Court that there was involved therein title to oil and gas leases, that whatever title, if any, the defendants herein have, was got and obtained under and by virtue of an assignment, the delivery of which was obtained under and by virtue of a conspiracy entered into by and beween A. G. Talbot and E. T. Maynard on or about July 18, 1944; that on such date plaintiff signed a letter dated June 30, 1944, which is Exhibit "C" attached to said fourth amended original petition; that the purpose of said conspiracy was to secure and retain possession of said assignment which had thertofore been placed in escrow with Jerry B. Newby. That an attempt had theretofore been made to perforate the casing on the fourth well therein referred to, known as the Mills well; that the plaintiffs therein together with A. G. Talbot, E. T. Maynard and E. W. Robitaille, met in the office of Carey G. King, at Dallas, Texas, on said 18th day of July, 1944, and after much discussion came to the conclusion, unanimously, that none of the bullets had perforated into the Woodbine sand, which had been drilled into, so as to permit

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oil, gas or condensate to come into the casing; that all said five parties believed that if, as and when the opening or openings were made through such casing and the cement on the outside thereof at the proper depth that oil, gas and condensate would come into such casing and that it would then produce oil, gas and condensate; that the said Talbot, Maynard and Robitaille, falsely, fraudulently and deceitfully promised to thereafter complete said well; and after obtaining possession of the assignment, which was then in escrow with the said Jerry B. Newby, failed, neglected to complete said well. That said A. G. Talbot with the advice and consent, and in the hearing of E. T. Maynard, on August 9, 1945, said to this plaintiff, "We don't care to put another d--- cent into the Houston County property." Plaintiff alleges that defendants have not since August 1945, put a single one of their cents into said Houston County property; That another attempt to perforate the casing and cement was made on or about July 21, 1944; that the results thereof were the same as previously, to-wit: no penetration into the potentially productive sand behind said casing and cement. That said letter dated June 30, 1944, was actually signed on July 18, 1944, and left with Carey G. King, attorney for Talbot & Maynard, to be used if, as and when such Mills well was completed. That said Mills well has never to this date been completed. Plaintiff alleges that at all times the defendants herein and A. G. Talbot, Carey G. King and Jerry B. Newby knew the said Mills well had not been completed. That on July 22, 1944, this plaintiff notified Mr. Jerry B. Newby, 1816 North

West 23rd Street, Oklahoma City, Oklahoma, that another attempt had been made to perforate "*** the Mills well again today and it still didn't do anything." That thereafter and on July 27, 1944, the said Jerry B. Newby, escrow agent, wrote plaintiff the following letter:

> "This suggestion is probably one which you have considered already, namely, that in the Mills well, for some reason which I will not even attempt to explain, the hole through the perforated zone is so large shooting has not penetrated through the cement or barely so. You may have used cement acid already and also the pipe may not be cemented high enough that it can be used safely, but it is the only suggestion I have for opening up the sand preceding the use of mud acid."

That at no time had any of the defendants herein, A. G. Talbot, Carey G. King, or Jerry B. Newby, relied upon said letter dated June 30, 1944, attached as Exhibit "C" to said fourth amended original petition.

III.

That there was to become due and owing to said Jerry B. Newby as a commission if, as, and when said fourth well was completed, which was to be an assignment out of production, if, as, and when said fourth well was completed; that said fourth well was not completed and was known to be not completed by all parties herein mentioned; that said Carey G. King breached his trust and forwarded said letter to the said Jerry B. Newby and the said Jerry B. Newby

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accepted the same and returned the assignment to said Carey G. King with full knowledge that same was not yet or then due and owing to Talbot & Maynard.

IV.

That thereafter B. W. King, attorney for the defendants in said Case No. 7773, and in Case No. 12,195, in the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, and for the respondents in Case No. A-2914 in the Supreme Court of Texas, in a telephone conversation from Crockett, Texas, with E. T. Maynard in Illinois, stated to the said E. T. Maynard, "I am down here without any client and with no law and no evidence and I am doing the best I can." Plaintiff alleges that the best the said B. W. King and associate counsel, Adams & Morgan, a firm composed of Earl Porter Adams and Walter P. Morgan, of Crockett, Texas, could do was to successfully succeed in deceiving and defrauding the District Court of Houston County, 3rd Judicial District of Texas, the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, and the Supreme Court of Texas into rendering and promulgating decisions and opinions that were and are a fraud on Plaintiffs in Case No. 7773; that said letter, attached as Exhibit "C" in Case No. 7773, was immaterial insofar as any cause of action therein involved was concerned but that defendants overreached and deceived the above mentioned Courts of Texas, into believing that it was material.

V.

Plaintiff hereby refers to the opinion in whole of the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston and makes the same a part hereof as if the same were copied herein in full. Such opinion is reported in Volume 233, Southwestern 2d, at Page 206, and states: "The contract of July 14, 1943, is lengthy, but for present purposes it is sufficient to say that by its terms Appellees were bound to drill into the Woodbine Sand, and to equip four wells." By the deceitful and fallacious arguments of defendants, which were not a part of the pleadings, defendants succeeded in overreaching, deceiving and defrauding said Court into believing that all that was necessary was to drill into the Woodbine sand and equip four wells; that it was the intention of the parties on July 14, 1943, that the defendants were to drill, equip and COMPLETE four wells, which has not been done. That in said contract the words complete, completed, completing and completion are used 26 times and said contract is subject to no other interpretation than that said four wells were to be completed. That in all of defendants briefs before all three courts they never once intimated that any of the defendants or the above-named parties relied upon such letter dated June 30, 1944, signed July 18, 1944, and delivered to Jerry B. Newby on or about July 25, 1944 as completing said well; that said letter is quoted in said opinion—"*** waive the making and furnishing you as Escrow Agent any and all of the affidavits set forth in or implied in said escrow agreement as a condition of delivering" the

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assignment. Nowhere in said letter and nowhere else is the completion of the Mills well waived. That the said Jerry B. Newby returned said assignment to Carey G. King on or about July 26, 1944, and the said Carey G. King immediately had same filed of record and the same has constituted a cloud upon plaintiff's title since such time. In such opinion it is said, "*** that under the terms of the contract of July 14, 1943, appellants were to participate in the payment of the cost of recording same and the inference is that this was done." There is nothing in the record to substantiate such a finding and it could be gathered only from the false and fraudulent misrepresentations of the defendants in their briefs, which was a further deceit upon the Courts therein involved.

In such opinion is, "It appears from appellants' allegations that they directed the escrow agent to deliver the assignment, stating in connection therewith that the four wells had been completed to their satisfaction ***". As hereinabove set out, plaintiff notified Jerry B. Newby on July 22, 1944, four days after said Exhibit "C" was signed, that another attempt had been made to perforate "*** the Mills well again today and it still didn't do anything." and the said escrow agent on July 27, 1944 suggested ways that might be used to complete the said Mills well, the same being approximately five days after he had been notified that said Mills well was not completed, that he could not rely upon the letter dated June 30, 1944, and approximately one day after he had deliv-

ered the assignment to Talbot & Maynard to Carey G. King, as proposed, being to make the assignment to himself, Jerry B. Newby effective.

VI.

The said A. G. Talbot acting for himself and all other defendants herein, on October 1, 1945, wrote the plaintiffs in Case No. 7773 as follows:

> "Dear Mr. Grimes: Mr. and Mrs. Maynard's and my letter to you of August 9th, relative to the loose equipment which we have on the Houston County property and also the equipment in the Mills well. I think there is one part of the last paragraph of the letter which should be clarified and which reads as follows: 'There is also a question as to whether or not the Mills well will be productive and in case it is productive in commercial quantities there is no question at all but what the equipment belongs to you.'
>
> Yours very truly,
> AGT:AB" /s/ A. G. TALBOT

The defendants on October 1, 1945, were then recognizing that the Mills well had not been completed and nothing since such date has been done towards the completion thereof. Plaintiff alleges that the delivery of said assignment to Talbot & Maynard was obtained in pursuance of said conspiracy, fraudulently and corruptly. That at said time, July 25, 1944, the said Talbot & Maynard owed the said Carey G. King an attorney fee and expenses which were to be paid after such assignment was recorded, and in pursuance of such conspiracy said Carey G. King con-

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ducted himself so as to collect his attorney fee and expenses without regard to the trust that had been placed in him and in violation therof and the said Jerry B. Newby, in order to secure the assignment to him for his commission if, as and when due, disregarded the trust and faith placed in him and delivered said assignment with full knowledge that said Mills well had not been completed, fraudulently, corruptly, and deceitfully. That said Carey G. King had said assignment to Talbot & Maynard recorded with full knowledge that said Mills well had not been completed.

VII.

In such opinion is, "Then comes this language, which appellants contend constitutes a full completion of the fourth well, a condition precedent to the passing of the title, to-wit: "It is further understood and agreed that this assignment is the same assignment referred to and contemplated in a certain contract in writing between the assignors hereunder" and appellees, "of date July 14, 1943, and that this assignment is subject to all of the terms, conditions, provisions and obligations set forth in said contract; ***" As appears from said assignment, said assignment "is subject to all of the terms, conditions, provisions and obligations set forth in said contract;***" Such has never been altered or amended and is still in full force and effect. Such contract provided unequivocally that it was necessary for defendants to COMPLETE said fourth well before having a one-

half interest in said block of leases. Said contract by its terms provided that if defendants drilled one well and abandoned their contract they were to receive 100% of their investment out of production; at that time plaintiffs in Case No. 7773 had thertofore completed the No. 1 M. B. Ellis well which has by itself produced more than sufficient to pay the defendants all that they are legally, equitably or morally entitled to. The defendants took no risk whatsoever and did not complete the contract validating such assignment. That said contract provided that in case defendants drilled, equipped and completed or abandoned two wells and then abandoned their contract that in that event they were to receive 125% of their investment. Said contract of July 14, 1943, provided that in case defendants drilled, equipped and completed or abandoned three wells and then abandoned their contract, that then and in that event they were to receive out of production 150% of their investment; Plaintiff alleges that the escrow agreement did not protect appellants as they were cheated, swindled and defrauded as herein set out.

There is in such opinion, "There is nothing in the language of the assignment which in and of itself would show that completion of the fourth well was made a condition precedent to the vitality of the assignment." Plaintiff alleges that the above quoted part "*** that it is further understood and agreed that this assignment is the same assignment referred to in the contract ***" makes, and it was the intention of all concerned, that it should be a part of such

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assignment. The opinion states, "Since it does not appear from the assignment that the full completion of the fourth well was a condition precedent, it must be made to appear by appellants from the contract that the completion of the fourth well was a condition precedent to the passing of the title." It appears from both the assignment and from the contract that the completion of the fourth well was a condition precedent.

Such opinion states, "The contract certainly intended the title should not pass until the completion of the fourth well and this was protected against by escrow agreement." Plaintiff alleges that title has not yet passed but that a cloud has been placed upon said title by the fraudulent filing of record of said assignment and the plaintiffs therein were not protected against the cloud upon the title by an escrow agreement because of the fraud, deceit and deception hereinbefore and hereinafter set out. It was never at any time intended by the plaintiffs therein that title should pass otherwise than upon the completion of the fourth well. The Court properly cities the law in Manton v. City of San Antonio, 207 S.W. 951, 852, writ refused, "The general rule is that if the grant is without further consideration then the performance of the specified precedents, the converse of this proposition must be just and beneficient, and where there have been other considerations performed, and especially where full value has been paid, the condition will not be considered a condition precedent but will have applied to it the rules applicable to conditions sub-

sequent." Applying this rule, since it appears from appellants allegation that the contract required that appellees drill four wells into the Woodbine sand and it appears that this has been done, it is necessary to construe the condition in the assignment, if a condition it is, as a condition subsequent." Plaintiff alleges that at no time has full value been paid and therefore the condition is a condition precedent and should not have applied to it the rules applicable to conditions subsequent. Plaintiff alleges that the proper reading should have been and would have been, except for the fraud and deceit of the defendants hereinbefore and hereinafter set out. "Applying this rule since it appears from appellants allegations that the contract required that appellees drill, EQUIP AND COMPLETE four wells into the Woodbine sand, and it appears that this has NOT been done, it is necessary to construe the condition in the assignment as a condition precedent. Plaintiff alleges that such assignment was not delivered pursuant to such letter but was delivered fraudulently and corruptly as hereinabove set out; that thereafter appellants in said Case No. 12,195 appealed said case to the Supreme Court of Texas and it was there docketed as Case No. A-2914; that said Supreme Court of Texas affirmed said opinion without writing an opinion in 1951.

VIII.

That on the 21st of February 1951, in a conversation between this plaintiff and B. W. King, agent and attorney for the defendants, plaintiff stated to said B.

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W. King in the lobby of the Crockett Hotel, at Crockett, Texas, in connection with the aforesaid opinion that, "Good old gentlemen like those on the Court of Civil Appeals at Galveston, after long and faithful service to the State, should be put out on green pastures and not left in a position of trust where they could continue to perpetrate frauds upon the public." To which the said B. W. King replied, "Yes, yes that decision is very senile, VERY SENILE;" Plaintiff agrees with said defendants and their attorneys that said decision is very senile and is, therefore, null and void, and should be held to be of no force or effect.

At the conference in the office of Cary G. King, in Dallas, Texas, on July 18, 1944, it was unanimously agreed by A. G. Talbot, E. T. Maynard, E. W. Robitaille, Russell W. Grims and Harlan Grimes that the Mills well was not completed. There was much discussion as to methods of completing said Mills well and, among other things mud acid and cement acid were suggested and it was unanimously agreed that it would be useless to use either since there were no holes through the casing. During such conference this plaintiff suggested that so many methods would be expensive and might be a waste of money, and A. G. Talbot said, "We don't give a d - - - if it costs $50,000, we will complete it. Isn't that right, Mr. Maynard?" To which E. T. Maynard replied "That is right." That said statements by A. G. Talbot was false and fraudulent and known to the defendants to be false and fraudulent at the time as under the partnership arrangements between Talbot and Maynard it would have been the

duty and obligation of A. G. Talbot to furnish $25,000 and plaintiff is now informed and believes and therefore alleges that the said A. G. Talbott did not at that time or at any time since have in his possession $25,000 with which to have paid his part.

In August of 1944 this plaintiff told E. W. Robitaille, at that time agent for A. G. Talbot, E. T. Maynard and Betty V. Maynard, and since that time for the defendants herein, about a well which a Shell Oil Company had drilled in Louisiana known as No. 1 Bollinger in the North Carterville area, in which well there was a similarity to the Mills well. In that well various gun perforating companies had attempted to perforate the casing at the approximate depth of 6100 feet; that in such attempts there were 465 bullets placed in said well to perforate the casing therein; that 435 of said bullets exploded; that 30 of said bullets were pulled out of said well still in the guns unexploded; that out of the total of 435 bullets which left the gun not one penetrated through the casing and cement surrounding casing, such bullets were of varying sizes with varying amounts of powder used in different operations; that thereafter Shell Oil Company milled out the casing opposite the productive zone in 1943 and such well has been a commercial producer of oil since that date. That said Robitaille's only answer was that "Our assignment is on record." That plaintiff thereafter told the said A. G. Talbot, E. T. Maynard and E. W. Robitaille of such Shell No. 1 Bollinger; that they made no attempt whatsoever to complete the Mills well at any time since July 1944; that said Mills well could

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have been completed by milling out the casing opposite the formation which it is undisputed will produce gas and condensate.

That at various times since August 9, 1945, in the presence of A. G. Talbot, E. T. Maynard and E. W. Robitaille and this plaintiff there has been discussion of the statements hereinabove referred to made by said Talbot August 9, 1945, "We don't care to spend another d - - - cent on the Houston County property," and since August 1945, none of the defendants have spent or invested any of their own monies in the properties herein involved.

IX.

Plaintiff alleges that in furtherance of the plans, schemes, and conspiracy to cheat, swindle and defraud as herein set out, that each and all of the defendants herein together with A. G. Talbot, B. W. King, Carey G. King, Earle Porter Adams, Walter B. Morgan and Jerry B. Newby, were agents of and for each and all the others in furtherance of the plan, scheme, and conspiracy.

X.

That in furtherance of such plan, scheme and conspiracy to overreach deceive and defraud the District Court of Houston County, Texas, into rendering an erroneous judgment, the defendants through their attorneys filed with the District Court of Houston County, Texas, a brief studiously designed to deceive and

mislead such Court and said brief did mislead and deceive said Court into rendering an erroneous decision as set out in the transcript heretofore referred to. In such brief is "*** we now believe their contention to be that the assignment itself has within its own terms a condition based upon the drilling of the fourth well. Before further discussion as to whether or not the assignment itself contains a condition as stated, we assume for a moment that the assignment does not contain such a condition." By ingenious reasoning the defendants assumed an erroneous decision out of said Court. Said brief states, "*** It is undisputed that the plaintiffs did authorize the delivery of the assignment. It is not a case where the escrow agent deliver the instrument prior to completion of conditions and without authority from the grantors." Such statement is false, and was known to be false by the utterers thereof for the purpose of deceiving as herein stated.

At another place it is stated, "However, when as in the instant case the grantors waived the conditions ***" and then proceed to reason from such false assumption, thereby misleading the Court as was contemplated. Such brief assumes that the conveyance is absolute in form, thereby further misleading the Court. Defendants quote from paragraph 13 and underscore "and shall be entitled to receive" but fail to underscore or emphasize that same was conditioned "upon the completion of said fourth well." Further said brief contains, "The conveyance becomes the sole repository of the terms as to any matters involved in this part of the contract." The defendants therein were attempt-

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ing to fraudulently pick out one small part of such transaction that happens to sound to their advantage and thereby wrongfully influence said Court. Another statement in the same vein is, "Some of the provisions were clearly antecedent and should be merged into the assignment. These are the provisions providing for the drilling and completion of four wells; there can be no question but what these matters were intended to be past history after delivery of the assignment." Such last statement is a pure myth and fiction manufactured and fabricated by the defendants for the purpose of deceiving and defrauding as herein set out and not connected with facts or pleadings. Further in such brief is, "The contract made the drilling and completion of four wells conditions to delivery." The pleadings and the facts are that the completion of four wells was to be the consideration which defendants were to pay for a half-interest and in case they did not complete four wells the contract provided otherwise. Such brief states, "This was ample protection to the assignors ***" which is erroneous and false as defendants have not yet paid for, in full, said assignment nor has the completion of the fourth well been waived. Such brief goes on and states that "An instrument which when legally delivered ***" and then assumes without any basis of fact or pleading that such assignment was legally delivered. Such brief later states "*** the assignment is 'without conditions' that is, it is without conditions insofar as passage of title as such is concerned." Such statement in said brief was false and known by the utterers thereof to be false and made

for the purpose of furthering said conspiracy as herein alleged. Such brief contains, "Since drilling of the fourth well is not a condition within the language of the assignment itself, ***" Such statement is deliberately false and made for the purpose of deceiving the Court and for said Court to perpetrate a fraud upon the plaintiffs therein as defendants well knew that the only consideration was the drilling, equipping and completing of four wells, which has not been done. Such brief states, "Assignors had secured their protection by making the drilling of the wells a condition to delivery when they elected to waive such condition ***". Such statement could only be made for the purpose of deceiving said Court and did deceive said Court by distorting the mind of the Court into believing that the drilling, equipping, and completing of the fourth well was waived when there is nothing in fact or in pleading waiving such completion of the fourth well, all of which is and has been at all times well known to all of the defendants and all of their co-conspirators. Said Brief further states, "*** the undisputed facts are that at the time they chose to waive their protection ***" such being another one of the ingenious false assumptions to tell and repeat a falsehood long enough and often enough that it will eventually mislead the one to whom it is directed, and to whom it is intended to mislead and deceive. Said brief further states, "*** and there being a good faith dispute as to whether or not the fourth well had been completed." Such fact of a good faith dispute has never existed. Not only that, but there was never any

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contention by the defendants herein or A. G. Talbot or anyone else connected with the defendants or any of their co-conspirators, that said Mills well had been completed until after Case No. 7773 had been filed. Reference is here made to the letter of A. G. Talbot dated October 1, 1945, hereinbefore quoted. Such brief states, "It would seem that the assignors were satisfied that there had been a substantial performance, ***" which statement is false and misleading in that the contract did not call for a substantial performance but called for the drilling, equipping and COMPLETION of four wells and since it is unanimously agreed that the Mills well was capable of producing the assignors are not satisfied with anything less than a full completion of the Mills well. There is nothing in the pleadings or facts showing that the plaintiffs herein have waived anything except the making of some affidavits and that was nullified by this plaintiff placing the escrow holder on notice on July 22, 1944, that said Mills well had not been completed. Said letter, "Exhibit C" was not addressed to any of the defendants herein nor their predecessors and all the defendants herein know such, and also that no consideration of any kind or character whatsoever was paid for such letter, it merely being signed as an accommodation and no consideration ever was or has been received therefor and the defendants in Case No. 7773 were already bound and obligated to complete the Mills well, which has not been done.

XI.

That thereafter the defendants filed in the Court of

Civil Appeals for the First Supreme Judicial District of Texas at Galveston, in case No. 12,195, a brief similar to the one filed with the District Court of Houston County, Texas, which has just previously been referred to; that same was therein filed for the purpose of deceiving the Members of said Court and to cause them to perpetrate a fraud upon the appellants therein, which motive was successful in that said Court did, through the fraud of the defendants, perpetrate a fraud upon the appellants therein. On page 4 of appellee's brief therein is, "The original contract provided in paragraph 13 as follows: 'If the first parties drill the fourth well hereunder upon completion of said well first parties shall have fully complied with all their obligations hereunder and shall be en titled to receive WITHOUT CONDITION (emphasis supplied) assignment ***'. The appellees therein studiously and intentionally omitted capitalizing "upon completion of said fourth well". There is in such quotation which was not emphasized by appellees therein "If the first parties drill the fourth well hereunder, upon completion of said fourth well **, the escrow holder, Jerry B. Newby, is authorized and empowered to deliver such assignment to the first parties." Then and only then is Jerry B. Newby authorized and empowered to deliver such assignment. Such brief contains, "*** with all the presumption of delivery *** so that it carries all the presumption of vesting title and right of possessions ***". Appellees therein were attempting to and did presume themselves into a false state of alleged facts unsupported by pleadings. Appellees then set out the letter

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dated June 30, 1944, without giving the facts surrounding it and without telling this Court that Jerry B. Newby had been notified on July 22, 1944, that said Mills well was uncompleted and without setting out that the delivery thereof was obtained by fraud by delivering the commission assignment to Jerry B. Newby and without informing the Court that Jerry B. Newby had written this plaintiff a letter on July 27, 1944, suggesting ways to thereafter complete the said Mills well. That said brief is full of calculated and studious deceit made for the purpose of deceiving said Court of Civil Appeals at Galveston. Such brief assumes that the contract has been fully complied with and then quotes, "upon completion of the said fourth well" proceeding to presume that said fourth well had been completed when in truth and in fact all of said conspirators knew that said fourth well had not then and has not yet been completed.

Such brief states, "In Manton v. City of San Antonio, 207 S.W. 951, where writ of error was denied, this case holds: The general rule is that where a deed is to take effect upon performance of a condition by a grantee and the grant is without further consideration, no title will pass until the condition is performed, but where other conditions have been performed and especially where full value has been paid, the condition will be considered as a condition subsequent." In the above case, with opinion by Chief Justice Fly, with writ of error denied by the Supreme Court, it is there held, in point 4, that a substantial compliance with the terms of a condition subsequent

will satisfy the law and prevent a forfeiture of title." The impression sought to be left throughout is that full value had been paid, thereby inducing said Court to hold that the condition will be considered as a condition subsequent, which is directly contrary to the intention of the parties at all time up until they corruptly obtained possession of said assignment. Plaintiff alleges that substantial compliance was not involved; that in order for title to an undivided one-half interest to pass it required 100% compliance. Othewise the contract provided for partial compliance and the Court should give force and effect to the plain meaning of contracts.

In such brief is, "*** Appellees had, and did spend a huge sum of money in drilling and completing three of said wells and in drilling, testing and completing, as they claim, well No. 4" There was no contention on the part of anyone at any time that said Mills well was complete until after the filing of Case No. 7773.

Such brief contains, "*** drilling same for the appellants ***". Plaintliff alleges that the appellees therein were drilling said wells for their own benefit and that they have not at any time within the knuowledge of this plaintiff had so much charity that they would at any time have done anything for anyone else without receiving an advantage. That this plaintiff has heard the defendant, E. T. Maynard, brag that he was worth millions of dollars and had never donated one cent for charity. Such statement as above quoted was designedly made to impress said

Court fraudulently that appellees therein had done some drilling as a favor to the appellants.

Such brief further contains, "*** and to the satisfaction of the appellants as recited in their Exhibit C.* The impression sought to be left thereby was fraudulent as all defendants knew that appellants were not satisfied. Later in said brief is, "*** the Court will take into consideration this huge sum of money that had been spent for the use and benefit of the appellants. ***", again attempting to leave a false impression with the Court and did leave a false and fraudulent impression with the Court, thereby causing the Court to perpetrate a fraud upon the appellants therein. Same was not spent for the use and benefit of appellants as defendants are not a charitable institution by any manner or means and ap pellees therein studiously omitted to mention that appellants had devoted several years of work and much money in the geologizing, assembling, drilling, unitizing and operation of said block.

Such brief further states, "The Court should construe the same as conditions subsequent, rather than applying the harsh cold rule of forfeiture." Appellees therein were fraudulently attempting to and did succeed in having said Court construe said conditions precedent as conditions subsequent and apply the harsh, cold rule the defendants could substitute fraud and deceit as a fulfillment of their contract.

Such brief further states, "*** then, does this Honorable Court think that the appellants had any

right to waive the appellees' interest after they had probably spent more than One Hundred Thousand Dollars for the use and benefit of the appellants? It would be unreasonable and harsh to make such a finding." Plaintiff alleges that appellants took all of the risks, that appellees took absolutely none but had bankers security at all times herein involved. That appellants have invested more money in said block than defendants and have invested therein several thousand times as much time and work as have the defendants. Apellees therein would have the Court to believe that it is reasonable to approve of their fraud, corruption and deceit and so connived to secure such ruling.

On page 14 of such brief is, "Another important point is whether or not the consideration for the deed has substantially been performed or paid." Such statement is false and fraudulent and was with the intention of having the Court perpetrate a fraud upon appellants. "Substantially performed or paid" was wholly immaterial. Plaintiff alleges that the only thing involved is "was the contract completed" and no amount of surreptitious reasoning can alter the fact that the fourth well has not been completed, nor the possession of said assignment was obtained by fraud and deceit as herein set out.

On page 15 of said brief is, "*** since appellees would inflict damage upon themselves not to complete well No. 4. ***", which is placed therein wholly unsupported by fact or pleading and for the purpose of deceiving said Court. Plaintiff alleges that without

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the permission of this plaintiff the defendants in December, 1946, pulled the casing from said Mills well, sold it on the "black" market for between $6900 and $7000 and have never accounted to plaintiff for a single cent thereof.

Another false statement in said brief is, "when faced with the fact, as shown in the pleading, that appellees have paid the consideration called for in the contract and assignment." Such false statement was made for the purpose of deceiving said Court and for said Court to perpetrate a fraud upon the appellants therein, which said Court did.

Such brief contains, "*** that equity and fair dealing require that it be construed by holding it to be a condition subsequent." Plaintiff alleges that under the circumstances of defendants refusing to complete the Mills well and refusing to "spend another cent upon the Houston County properties" after August 1945, that defendants have missed an excellent opportunity to be very quiet concerning equity and fair dealing. That all of said statements in said brief filed in the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, as herein set out, were false and fraudulent, were known by the utterers therof to be false and fraudulent at the time same were made, that the same were made in furtherance of said conspiracy to cheat, swindle, and defraud said Court and thereby have said Court to cheat defraud and swindle the appellants therein as hereinabove set out.

XII.

That said Court of Civil Appeals refused to reconsider its opinion on October 6, 1950, and that thereafter the same was appealed to the Supreme Court of Texas and docketed as Case No. A-2914. That the same plan, scheme and conspiracy continued from on or about July 18, 1944, through all the proceedings in the District Court of Houston County, Texas, through all the proceedings in the Court of Civil Appeals as aforesaid, throughout all the proceedings in the Supreme Court of Texas, and has continued since and is still in existence unstopped and unabated. That the respondents, defendants herein, filed in said case in the Supreme Court of Texas Answer to Application for Writ of Error is which the defendants herein quoted the letter dated June 30, 1944, known as Exhibit "C", without telling the Court that same was signed on July 18, 1944, and the circumstances under which it was signed, without telling the Court that none of the defendants or their co-conspirators relied upon said letter, without telling the Court that this plaintiff had notified Jerry B. Newby on July 22, 1944, that said Mills well was uncompleted, and without telling the Court that on July 27, 1944, said Jerry B. Newby in a letter to this plantiff suggested ways of thereafter completing said Mills well.

On pages 4 and 5 of said Answer there is, "The fourth well, was drilled, and is claimed by respondents, completed, which contention petitioner acquiesced for nearly two years ***". Such statement was false and fraudulent and was made for the purpose of de-

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ceiving the Supreme Court of Texas. Defendants well knew that petitioners therein did not acquiesce for nearly two years but, on the contrary, much correspondence had been written by this plaintiff to defendants and A. G. Talbot demanding that respondents either complete the Mills well or return the assignment and receive an assignment in accordance with the contract of July 14, 1943, and defendants had all ignored said correspondence and at no time made any claims that the Mills well had been completed until after the filing of Case No. 7773.

On Page 5, is, "Respondents became clothed with all rights by the assignee under said assignment, which in law vested the title in them and gave them a right of possession and ownership to operate said leases; and said leases were so operated up to the date of filing this suit ***" Said statement is false and misleading and was so intended by the utterers thereof and intended to perpetrate a fraud upon the Supreme Court of Texas, which was done, thereby causing said Court to perpetrate a fraud upon the petitioners therein. Respondents therein did not operate said leases up to the date of filing of said suit. On the contrary, respondents refused to "put another d - - - cent into the Houston County properties" in August 1945. Plaintiff alleges that that is one true statement that respondents made.

Such answer on Page 5 states, "However, if there was a condition precedent, the directions and instructions to the escrow agent. Jerry B. Newby, to deliver the assignment, and the actual delivery and recording

thereof, and the operation of the lease from 1944 to 1947, waived any condition precedent and reduced any such condition, if any, to a condition subsequent as is so clearly shown in Justice Cody's opinion for the Court of Civil Appeals in this case." Plaintiff alleges that such opinion is the same and identical opinion that the defendants, through their attorney, the Honorable B. W. King, on the 21st day of February, 1951, in the lobby of the Crockett Hotel at Crockett, Texas, in one of his honest moments referred to as "very senile, VERY SENILE."

It was the duty of B. W. King, Earle Porter Adams and Walter B. Morgan as officers of the Courts and under their oaths as attorneys to disclose to the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston, to the Supreme Court of Texas and to the District Court of Houston County, Third Judicial District of Texas, that said opinion by the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston was erroneous, which duty said attorneys failed to perform, and it was a breach of their oblgations and liabilities as attorneys to fraudulently use the same for their corrupt advantage. At no time have any of said attorneys been disciplined for the fraud herein set out.

On page 7 is, "Thus it will be seen that the assignment was delivered by the escrow agent and that all conditions with reference to performance of the contract were waived, ***". Such statement was designedly calculated and conceived for the purpose of defrauding the Supreme Court of Texas into falsely believing

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that all conditions with reference to the performance of the contract were waived, when an examination of said letter indicates that nowhere, at any time, is the completion of the fourth well waived, and respondents therein studiously omitted to inform said Court that they, the respondents, did not rely upon said letter; that said escrow holder, Jerry B. Newby, was notified on July 22, 1944, that said Mills well was not completed and that on July 27, 1944, the said Jerry B. Newby suggested to this plaintiff ways and means of thereafter completing said Mills well. So that none of the co-conspirators at any time and in any manner actually and honestly relied upon said letter known as Exhibit "C" except for the purpose of deceiving and defrauding the three Courts which they did deceive and defraud and thereby cause said three Courts to defraud the petitioners in Case No. A-2914 in the Supreme Court of Texas.

On Page 8 of said Answer, respondents quote at length from the opinion of the Court of Civil Appeals which they have styled "very senile, very senile."

On page 10 is, "Their interest in the completion of the well being mutual and each owning a recorded interest of one-half of said fourth well, including the leasehold estate, the equipment thereon and the oil to be produced therefrom ***". Plaintiff again alleges that the respondents abandoned said contract and appropriated the casing from said Mills well to their own use and benefit and sold same upon the "Black" market for a sum between $6900 and $7000 and have

never accounted to respondents therein for any part thereof.

XIII.

Respondents thereafter filed an answer to petitioner's motion for rehearing in the Supreme Court of Texas in which they state, "In fact, everything done was done by Grimes Brothers, they being in charge of operations and no complaint was made." Such statement is wholly unsupported by any pleadings and the respondents, as was their habit and custom, went completely out of the record and away from the true facts to falsely leave the wrong impression with the Supreme Court of Texas for the purpose of having said Court deceive petitioners. Plaintiff alleges that he has complained continually for over eight (8) years in and out of Court and, so far, has received no relief or equity. Another false statement deliberately made was "in other words the hole had been drilled and completed to the satisfaction of petitioners which facts were admitted in petitioner's letter dated June 30, 1944." Such satement was known to be false at the time it was made for the purpose of deceiving the Supreme Court of Texas and have the Supreme Court defraud the petitioners. The rankest kind of reasoning is contained in said answer when it states, "This letter was relied upon and the contract was thereby completed, ***" Plaintiff alleges that a false reliance upon a piece of paper obtained by fraud cannot possibly physically complete a well at approximately six thousand feet below the surface of the ground. And such statement was made for the purpose of and

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did deceive the Supreme Court of Texas, thereby causing said Court to perpetrate a fraud upon the petitioners therein.

Each and all of the defendants herein together with A. G. Talbot ratified and condoned such frauds as are herein set out and accepted the benefits and advantages thereof.

Plaintiff has at all times and hereby renews his offer to do equity in all matters and things herein concerned. Plaintiff alleges that defendants should account to plaintiff for all sums of money unlawfully, wrongfully or deceitfully received in connection with the above mentioned matters. Defendants have received in excess of $175,000.00 from said properties which is greatly in excess of what they are legally, morally or equitably entitled to.

Since there was no consideration paid for the letter dated June 30, 1944, plaintiff hereby withdraws and cancels his signature thereon since the same has been used fraudulently, and it was the purpose to so use the same at the time that his signature thereto was obtained. Plaintiff withdraws, cancels and nullifies his signature on the assignment referred to as Exhibit "B" since full consideration has never been paid therefor, and the facts and circumstances have never existed whereby such assignment was to be and become effective; and also in view of the fact that delivery thereof was obtained through fraud as herein set out.

Plaintiff alleges that the three Courts, namely, the District Court of Houston County, Texas, the Court of

Civil Appeals for the First Supreme Judicial District of Texas at Galveston and the Supreme Court of Texas, have attempted to and have used property of this plaintiff unlawfully without any consideration to the rights of this plaintiff and without due process of law, in violation of Section I, Article XIV of the Amendments to the Constitution of the United States of America.

Plaintiff alleges that the District Court of Houston County, Texas, and the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston, and the Supreme Court of Texas have denied to this plaintiff the equal protection of the laws of the State of Texas in violation of Section I, Article XIV of the Amendments to the Constitution of the United States of America.

Plaintiff alleges that the affirmation of the Supreme Court of Texas in Case No. A-2914 of the decision by the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston should be cancelled, set aside, and held for naught, and that a proper opinion should be rendered according to the law and facts. That the decision by the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston, in Case No. 12,195, should be cancelled, set aside and held for naught and a proper decision rendered according to the law and facts. That the decision of the District Court of Houston County, Third Judicial District of Texas, should be cancelled, set aside and held for naught and a proper decision rendered according to the law and facts. Plaintiff al-

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leges that by and through the fraud of the defendants as herein set out, he has been damaged in the sum of $250,000.00. That the defendants herein are jointly and severally liable to this plaintiff in the sum of $250,000.00.

Plaintiff now moves that all members of any of the three Honorable Courts who have heretofore considered such matters or who were members of any of said Honorable Courts at the times same were before any of said Honorable Courts certify their disqualification for the reason and upon the ground that said Members minds are fixed and determined and that plaintiff cannot receive a fair and impartial hearing upon such matters at the hands of such Members, which plaintiff has a right to.

Wherefore plaintiff prays that the affirmation by the Supreme Court of Texas in Case No. A-2914 of the decision of the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston be cancelled and set aside and held for naught and that the decision of the Court of Civil Appeals of the First Supreme Judicial District of Texas at Galveston in Case No. 12,195 be cancelled, set aside and held for naught. That the judgment of the District Court of Houston County, Third Judicial District of Texas, in Case No. 7773 be cancelled, set aside and held for naught, and that in each instance a proper decision be rendered according to the law and facts. That the plaintiff do have and recover of and from each and all of the defendants herein jointly and severally judgment in the amount of $250,000.00.

XIV.

Plaintiff hereby refers to all of the foregoing allegations and makes the same a part hereof the same as if copied herein in full.

Plaintiff alleges that commencing in February 1948 the defendants and their co-conspirators told this plaintiff that the defendant, E. T. Maynard, had sold one million bushels of wheat short on the Chicago Grain Exchange; that on four successive trading days the price of wheat on the Chicago Grain Exchange dropped or declined the maximum of ten cents per bushel per day; that the said E. T. Maynard on the fourth trading day thereafter bought one million bushels of wheat to make up for his short sale and thereby cleared a profit of $400,000.00 in four trading days. That said E. T. Maynard was called to Washington, D. C., for the purpose of testifying before a Committee of the U. S. Senate; that same made him nervous; that thereafter he received numerous letters and calls from the public generally inquiring as to how to make money on the Grain Exchange, which also made him very nervous; that said E. T. Maynard received much publicity from said transaction and that thereafter the said E. T. Maynard suffered a heart attack in or near Philadelphia, Pa., in a Pullman car, while traveling; that the side of said Pullman car had to be cut away with a torch in order to remove the said E. T. Maynard from said Pullman car; that he was taken to his home in Winnetka, Illinois, and that he would thereafter never again be able to leave his said home, at Winnetka; that he was

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not permitted to transact any details of any business; that he was not permitted or allowed to engage in any business transactions; that the stock market pages of the newspapers were removed before he was allowed to look at any newspaper, and that any irritation or excitement would prove fatal; that such line of propaganda was used by the defendants upon every occasion when this plaintiff was in conversation with any of the defendants or co-conspirators; that in February 1951 after the mandate from the above mentioned Courts had been returned to the District Court of Houston County, the defendants herein filed a suit asking that title be quieted in the defendants to a one-half interest to said block of oil and gas leases, and asking for the appointment of a receiver; that the defendants therein asked for permission to take some depositions which application was denied by the District Court of Houston County, Texas; that this plaintiff desired to take the deposition of E. T. Maynard; that the defendants had threatened for a long time to enjoin this plaintiff should he ever attempt to take the deposition of E. T. Maynard; that if the deposition of E. T. Maynard had been taken it would have shown that on July 18, 1944, and at no time since did he or A. G. Talbot have any good faith intention to complete said Mills well, but that their only intention was to secure possession of said assignment and to record same, and thereby claim an interest in said block of oil and gas leases the same as if it had been earned and paid for in full, and the same as if the defendants were entitled to said interest. That said false claims were made for the purpose of fur-

thering the conspiracy hereinbefore alleged; Plaintiff believed all of such statements to be true and relied thereon to his damage. Had defendants been honest and informed plaintiff that E. T. Maynard was physically and mentally competent to give a deposition he, plaintiff, would not have agreed to such judgment. Had defendants been honest and informed plaintiff that E. T. Maynard was about to embark on a three months trip he, plaintiff, would not have agreed to such judgment. That as a result of the fraud, deceit, and deception of the defendants, this plaintiff entered into the agreed judgment in March of 1951, the effect of which was to confirm said assignment. Plaintiff herewith, because of the fraud hereinbefore and hereinafter set out, withdraws as a party to said agreed judgment and withdraws his signature therefrom.

That thereafter the said E. W. Robitaille informed this plaintiff that the defendant E. T. Maynard had gone on a three-month trip to Paris, France, to help the City of Paris, France, celebrate its 2000th anniversary. Plaintiff alleges that said E. T. Maynard did go to Paris, France; that he was physically able to withstand such a trip and that at the time referred to, in March, 1951, that the said E. T. Maynard was physically and mentally able to give a deposition concerning all of the above mentioned matters and things. That since learning of said trip by the said E. T. Maynard, plaintiff has done nothing to ratify, condone or approve said judgment or said fraud, deceit or corruption.

That because of such fraud and deceit, plaintiff is

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entitled to have said judgment cancelled, set aside and held for naught; that defendants and each of them cooperated in said conspiracy together with others and that defendant has been damaged by said fraud and deceit in the sum of $250,000.00; that defendants and each of them are jointly and severally liable to plaintiff for the said sum of $250,00.00.

Wherefore, plaintiff prays that such judgment entered in March 1951, in Case No. 7997 in the District Court of Houston County, Third Judicial District of Texas, be cancelled, set aside and held for naught and that plaintiff have and recover of and from the defendants and each of them, jointly and severally, the sum of $250,000.00.

/s/ HARLAN GRIMES
Plaintiff Attorney Pro Se

Exhibit "K"

NO. 8083

HARLAN GRIMES
VS.
BETTY V. MAYNARD, EXECUTRIX, EARLE P. ADAMS, WALTER B. MORGAN, B. W. KING, ET AL

IN THE DISTRICT COURT
OF HOUSTON COUNTY, TEXAS
THIRD JUDICIAL DISTRICT

TO THE HONORABLE JUDGE OF SAID COURT:

SUPPLEMENT TO PETITION

Now comes the plaintiff, Harlan Grimes, with leave

of court having been had and obtained on this 19th day of September 1953, and files this his first supplemental amendment to his original petition and in addition to such original petition alleges and states:

I.

That Betty V. Maynard is Executrix of the last Will and Testament of E. T. Maynard, Deceased, that she resides at 969 Hill Road, Winnetka, Cook County, Illinois, that as such Executrix she is a necessary party to this suit. That Earle P. Adams is a resident of Crockett, Houston County, Texas; That Walter B. Morgan is a resident of Houston, Harris County, Texas; that B. W. King is a resident of Graham, Young County, Texas; That Betty V. Maynard, Executrix of the last Will and Testament of E. T. Maynard. Deceased, joined such conspiracy as Executrix at the moment she became such Executrix, the exact time being unknown to plaintiff but is known to all defendants. That Earle P. Adams, Walter B. Morgan and B. W. King joined the conspiracy formed on July 18, 1944, by E. T. Maynard and A. G. Talbot, to cheat, swindle and defraud plaintiffs in case No. 7773 in this Court, in about 1947, the exact time being unknown to plaintiff but is known to all defendants. That such conspiracy is still in existence.

II.

That Betty V. Maynard, Executrix as aforesaid, Earle P. Adams, Walter B. Morgan and B. W. King was actively aiding and assisting their co-conspirators

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in the promulgation, perpetration and perpetuation of the conspiracy as set out in the original petition and they and each of them are hereby made parties defendant herein.

III.

That the defendants Earle P. Adams, Walter B. Morgan and B. W. King have deprived this plaintiff of his day in Court by perpetrating the aforesaid frauds on the aforementioned courts and thereby causing the Court of Civil Appeals at Galveston to promulgate a senile decision, which is null, void, and of no force or effect except to unlawfully deprive plaintiff of his property. That Betty V. Maynard, as Executrix, Earle P. Adams, Walter B. Morgan and B. W. King have been and are agents of and for each and all other conspirators, that they and each of them have ratified, condoned, approved, and perpetuated such conspiracy and have accepted the benefits, fruits and spoils thereof. That to permit or allow such fraud and senility to stand would be a gross injustice.

IV.

Wherefore plaintiff prays that he may have and recover judgment against Betty V. Maynard, Executrix of the last Will and Testament of E. T. Maynard, Deceased, Earle P. Adams, Walter B. Morgan and B. W. King to the same extent as prayed for in the original petition against their co-conspirators and co-defendants.

/s/HARLAN GRIMES

Exhibit "L"

HARLAN GRIMES		IN THE DISTRICT COURT
VS	NO. 8083	OF HOUSTON COUNTY, TEXAS
EDWIN T. MAYNARD ET AL		THIRD JUDICIAL DISTRICT

JUDGMENT

On the 5th day of November, 1953, came on to be heard the plea in abatement and special exceptions of the defendants, in the above styled and numbered cause, and came the plaintiff, Harlan Grimes in person and as attorney prose and came the defendants by and through their attorney of record, Tod R. Adams, and all parties having announced ready to hear said plea and exceptions, and the court having determined that the plea in abatement and special exceptions originally filed by E. W. Robitaille as administrator with wil annexed of the last will and testament of A. G. Talbot, deceased, and Albert G. Talbot, Jr., had been adopted by all other defendants, in this cause, and the court having determined that the special exceptions contained in the paragraphs III, through and including VIII of the original answer of Betty V. Maynard, executrix of the last will of E. T. Maynard, deceased, Earle P. Adams, Walter B. Morgan, and B. W. King have been adopted by all of the other defendants by supplemental answer filed herein proceeded to take and hear, as to each and every Defendant the special exceptions and plea in abatement contained in the two answers above mentioned and the court having first heard and considered the plea in abatement contained in paragraph I of the answer of E. W. Robitaille et al and having considered the pleadings

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in plaintiff's petition and supplement to petition and the argument of counsel, it is the opinion of the court that the law is with the defendants;

It is therefore ORDERED, ADJUDGED AND DECREED by the court that such plea in abatement be, and the same is hereby sustained; and the plaintiff refusing in open court and failing to make any amendment, it is therefore, ORDERED, ADJUDGED AND DECREED by the court that the plaintiff's cause be, and it is hereby dismissed; that the defendants recover of the plaintiff their costs in this behalf expended, for which they may have their execution; to which action and ruling of the court plaintiff, at the time thereof in open court excepted, and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, sitting at Galveston.

And the court proceeded to hear and consider the special exceptions contained in the answers of the defendants as above stated, and such pleadings and the argument of counsel thereon being heard, it was and is the opinion of the court that the law is with the defendants on those special exceptions in the original answer of E. W. Robitaille et al, contained in the following Paragraphs thereof: II, III, [for reasons stated in subparagraphs (b), (c) and (d)] IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, and XXII, and it was and is the opinion of the court that the law is with the defendants upon the special exceptions contained in the original answer of Betty V. May-

nard, executrix et al, contained in the following paragraphs thereof: III, IV, V, VI, VII, VIII. It is therefore ORDERED, ADJUDGED AND DECREED by the Court that the special exceptions contained in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI and XXII of the original answer of E. W. Robitaille et al, and the speciol exceptions contained in Paragraphs III, IV, V, VI, VII, and VIII, of the answer of Betty V. Maynard, executrix, et al, be, and the same are hereby sustained; and the plaintiff refusing in open court and failing to make any amendment, it is therefore ORDERED, ADJUDGED AND DECREED by the court that the plaintiff's cause be, and it is hereby dismissed, and that the defendants recover of the plaintiff their costs in this behalf expended, for which they may have their execution; to which actions and rulings of the court plaintiff, at the time thereof, in open court excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, sitting at Galveston.

And the court having taken under consideration the special exceptions contained in Paragraphs XXIII, XXIV, XXV, and XXVI, of the original answer of E. W. Robitaille et al, and having considered the same and the pleadings and the argument of counsel thereon, it is the opinion of the court that the law is with the defendants. It is, therefore, ORDERED, ADJUDGED AND DECREED by the court that the special exceptions contained in the Paragraphs

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XXIII, XXIV, XXV, and XXVI of the original answer of E. W. Robitaille et al be, and the same are hereby sustained; and the plaintiff refusing in open court and failing to make any amendment, it is therefore, ORDERED, ADJUDGED AND DECREED by the court that the plaintiff's cause be, and it is hereby dismissed, and that the defendants recover of the plaintiff their costs in this behalf expended for which they may have their execution; at which actions and rulings of the court plaintiff at the time thereof in open court, excepted, and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas sitting in Galveston.

Signed and entered this the 19th day of November, 1953.

/s/ R. W. Williford
Judge

Exhibit "M"

AFFIRMED, JUNE 24, 1954
NO. 3180

IN THE
COURT OF CIVIL APPEALS
FOR THE
TENTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT WACO

HARLAN GRIMES, Appellant
VS.
EDWIN T. MAYNARD ET AL, Appellees

Appeal from District Court,
Houston County

OPINION

This is an appeal from an order of the court sustaining certain special exceptions to the appellant's original petition and the appellant having failed and refused to amend his pleadings, the court dismissed the action and appellant gave notice of appeal to the Court of Civil Appeals at Galveston and seasonably perfected his appeal to that Honorable Court and the cause is here on transfer by order of our Supreme Court.

Appellant assails the decree of the trial court on what he designates 39 points. Each of them is without

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merit and we will not state them for reasons hereinafter briefly stated.

Appellant has elected to represent himself in this cause. His original petition on which he went to trial consists of 33 typewritten legal cap paper. We have examined it with great care and it is our considered opinion that the petition does not present a justiciable question. Needless to say that under the old rules, it would have been subject to a general demurrer. The appellees followed the new rules and leveled certain exceptions to the pleadings and the court sustained exceptions stated in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 in the answer of defendant E. W. Robitaille and others and sustained exceptions 3, 4, 5, 6, 7 and 8 in the original answer of E. T. Maynard et al, and the appellant refused to comply with the orders of the court entered on such exceptions and further refused to amend his asserted cause of action and the court dismissed this cause. We sustain this action of the trial court.

We quote in part from appellant's brief his statement of the case: "This is a suit to set aside two judgments of the District Court of Houston County, both of which were entered through the fraud of appellees, a void judgment of this court, such being in Case No. 12,195, in which this Court found practically all the facts and all the law in favor of this appellant and then misapplied such law and facts so as to constitute a senile decision as admitted by appellees, which decision overruled the Supreme Court of Texas as to the established law of Texas, to set aside the

affirmation of such senile decision by the Supreme Court of Texas, for the rendition of proper decisions in all three Courts, and for damages for the fraud of appellees, and for equity. * * * The entire record in Case No. 12,195 in this Court is made a part hereof the same as if copied herein in full."

We quote substantially from appellee's brief the history of the litigation referred to in appellant's pleading, which statement in appellee's brief is not denied. See Rule 419, TRCP.

This is the fourth of a series of five suits between the present parties or their privities, except the Honorable Earle P. Adams, Walter B. Morgan and B. W. King, who were attorneys for appellees in other suits and who are made parties to the present suit, and the litigation here involves the same subject matter, namely, oil and gas leasehold estates covering several hundred acres of land in Houston County, Texas. The first suit was Cause No. 7773 in the District Court of Houston County, brought by appellant here and his brother, Russell W. Grimes, against A. G. Talbot et al, to cancel a written assignment of an undivided one-half interest in the leasehold estates. The trial judge sustained the special exceptions of A. G. Talbot et al and upon plaintiff's (Grimes) refusal to amend, dismissed the suit. The trial court's judgment was affirmed by the Galveston Court, being Cause No. 12,195 in that court, and it is reported in 233 S.W. 2d 206. The Supreme Court of Texas refused application for writ of error N.R.E., the cause there being No. 2914. (As we understand appellant's pleading here,

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he is asking us to set aside the decree of the trial court and the judgments entered in the Galveston Court of Civil Appeals and the Supreme Court.)

The second suit was Cause No. 7997 in the District Court of Houston County brought by Edwin T. Maynard et al against Harlan Grimes and Russell W. Grimes for an accounting and a receivership of the leasehold estates. This suit resulted in an agreed judgment, dated March 22, 1951, wherein the interests of the parties were adjudicated according to the judgment in the prior suit and the management and control of the leasehold estates were by agreement given to appellee, E. W. Robitaille, for a period of six months and after that until such property should be, upon written notice by one of the parties, sold as provided in said judgment, and providing that each of the parties would pay their pro-rata part of the expenses of operation of the property monthly as billed.

The third suit is Cause No. 8053 in the District Court of Houston County brought by E. W. Robitaille against Harlan Grimes to recover one-fourth of the expenses of the operation of the leasehold estate from April 1, 1951, to and including August 31, 1952, and attorney's fees. Upon trial judgment was rendered for Robitaille as prayed, and upon appeal the Court of Civil Appeals at Galveston affirmed the judgment as shown in 257 S.W. 2d 359, and the Supreme Court of Texas refused writ of error N.R.E. (As we understand appellant's pleading here, he is asking us to set aside the decree of the trial court and the judg-

ment entered in the Galveston Court of Civil Appeals and the Supreme Court).

The fifth suit is Cause No. 8146 in the District Court of Houston County and is of the same nature as No. 8053, but covering a period subsequent to August 21, 1952.

The fourth suit is the suit here on appeal, being Cause No. 8083 in the District Court of Houston County, Texas, brought by appellant against Edwin T. Maynard et al for the cancellation and setting aside of the judgment of the District Court of Houston County in Cause No. 7773 and of our Galveston Court of Civil Appeals in Cause No. 12,195 and of the Supreme Court of Texas in Cause No. A-2914, and for the cancellation and setting aside of the judgment of the District Court of Houston County in Cause No. 7997, which judgment, according to appellant's allegations, having been entered in March 1951. The alleged ground for cancellation of the judgment in Cause No. 7773 (which cause was affirmed by the Galveston Court and N.R.E.'d by the Supreme Court) are acts of appellees and their privities alleged to have been done prior to and adjudicated by the judgment in said cause. The alleged grounds for concellation of judgment in Cause No. 7997 are the same with the additional allegation that "in February 1951 after the mandate from the above mentioned courts had been returned to the District Court of Houston County" he was prevented from taking the deposition of E. T. Maynard by the allegedly false representation of appellees herein as to the health of E. T.

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Maynard, and except for such representations would have been able to show by such deposition matters that would have allegedly affected the judgment in the prior suit and appellant's agreement to the judgment in Cause No. 7997. (This is the end of statement of history taken from appellees' brief).

Appellees' Counter Points 1 and 2 are: "The trial court correctly sustained appellees' pleas in abatement and Special Exception contained in Paragraph II of Answer of E. W. Robitaille et al, for the reason that in the two cases in which judgments were sought to be cancelled, Russell W. Grimes was adjudicated a one-fourth interest in the leasehold estates and was therefore a necessary party to any suit for the cancellation of such judgments." We are in accord with this view and it need not be labored. See Veal vs. Thomason, 159 S.W. 2d 472 (S. Ct.), points 1 and 2 and 7, and cases there collated. See also: Sharpe vs. Landowners Oil Ass'n., 92 S.W. 2d 435 (Com. App. op. adopted by S. Ct.); Rogers Nat'l Bank of Jefferson vs. Pewitt, 231 S.W. 2d 487, (writ ref.); Hunt vs. McWilliams, 240 S.W. 2d 865 (S. Ct. of Ark.).

Appellees' Counter Point 4 is to the effect that the trial court did not err in making the rulings complained of in Appellant's Points Nos. 3, 4, 8-12, 14, 16-27, and 37, for the reason that the matters involved in such rulings were each and all in issue and directly adjudicated upon, or necessarily involved in the determination of Cause No. 7773, and the affirmance thereof by the Appellate Courts, in which a final

judgment was duly entered. We are in accord with this view.

Appellant's pleading on which he went to trial shows that he is attempting to relitigate issues in causes that have been heretofore litigated and decided adversely to him by the courts of our state. His attempt so to do is in conflict with our judicial history. In Rio Bravo Oil Co. vs. Hebert, 106 S.W. 2d 242 (cert. den. by U.S. S. Ct., 58 S. Ct. 366, 302 U.S. 759 82 L. Ed. 588, 58 S. Ct. 475, 82 L. Ed. 603), our Supreme Court had occasion to consider the question as to when a cause is res adjudicata and in so doing made this statement of the rule:

> "Where parties have had the opportunity of litigating certain issues, and a final judgment is entered in said cause adjudicating those issues, it is not the policy of the law to permit a relitigation of such questions. The rule is now well settled that a judgment on an issue directly involved in a case is conclusive in a second suit between the same parties, although the second suit relates to a different subject-matter. It is also equally well settled that an issue of fact necessary for a determination of issues in a prior case, and a judgment entered therein, creates an estoppel by judgment against relitigation of the same issues." Citing Hanrick vs. Gurley, 93 Tex. 458, 479, 54 S.W. 347, 55 S.W. 119, Westergreen, 119 Tex. 204, 27 S.W. 2d 526.

See also Commonwealth of Mass. vs. Davis, 168 S.W. 2d 216, 140 Tex. 398, cert. den. S. Ct. 63 S. Ct. 1447, 87 L. Ed. 1848, 64 S.Ct. 31, 88 L.Ed. 490. See also Vol. 24, Texas Digest, Judgments, Key Nos. 713(1) and 713(2).

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Our view is that the foregoing statement of the rule by our Supreme Court has been the rule adhered to by our Supreme Court from the beginning of our jurisprudence until this date and substantially the same rule is applied and adhered to by the Supreme Court of the United States, including all of our sister states. In fact, we know of no different rule in any foreign jurisdiction. The resaon for the rule is obvious. It is equitable and fair in that it give finality to litigation.

But appellant contends that he is entitled to proceed in this matter under the doctrine announced in Collins vs. Davenport, 192 S.W. 2d 291 (no writ history) and the opinion of our Supreme Court in Connecticut General Life Ins. Co. vs. Bryson, 219 S.W. 2d 799. We have considered carefully each of the foregoing opinions and in our view they are not applicable to appellant's situation and are in no wise in conflict with the rule announced by the Supreme Court in Rio Bravo Oil Co. vs. Hebert, supra.

Needless to say that appellant's original petition, insofar as it seeks to set aside former judgments entered by the district court of Houston County, Texas, is to that extent a collateral attack upon such former judgments, and, by reason thereof, is not permissible and must fail. See Crawford vs. McDonald, 88 Tex. 626, 33 S.W. 325. See also 25 Tex. Jur. Judgments, Secs. 280, 281, and pp. 743 and 745, and cases there collated. See also Grimes vs. Robitaille, supra, points 1 and 2, and Vol. 24, Tex. Dig., Judgments, Key No. 518.

Finding no reversible error in the action of the trial court, further comment here would be of no avail, and the judgment of the trial court is in all things affirmed.

JAKE TIREY
Associate Justice

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FILED
MAR 17 1955
HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 607

HARLAN GRIMES,
Petitioner,

v.

EDWIN T. MAYNARD, ET AL,
Respondents

RESPONDENTS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

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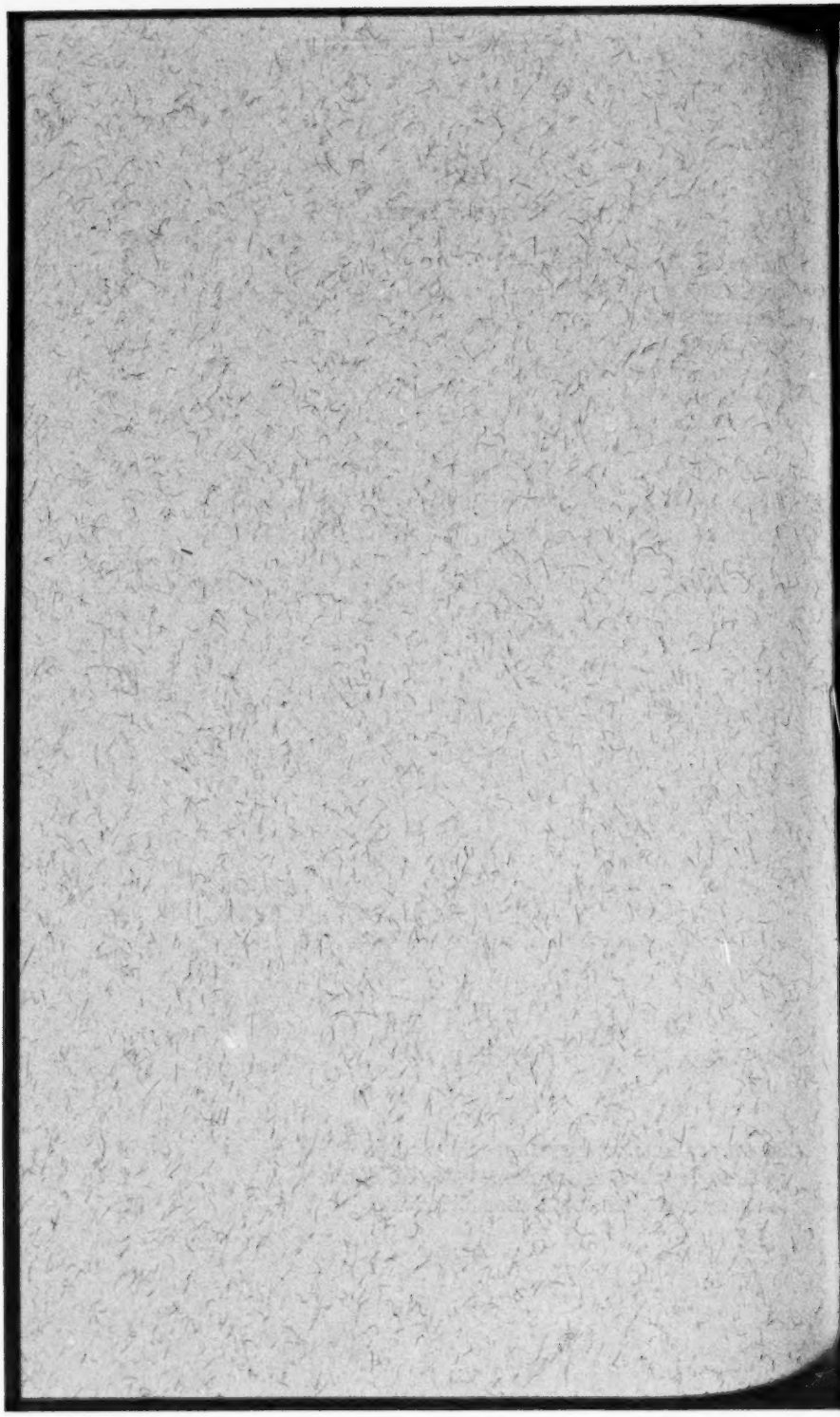

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 607

HARLAN GRIMES,

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v.

EDWIN T. MAYNARD, ET AL,

Respondents

RESPONDENTS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Comes now, Betty V. Maynard, individually and as Executrix of the Estate of E. T. Maynard, deceased, E. W. Robitaille, Administrator with the will Annexed of the Last Will and Testament of A. G. Talbot, deceased, A. G. Talbot, Jr., Helen Talbot Clark, Grover C. Clark, Elizabeth Talbot Hunt, Robert A. Hunt, Earle P. Adams, Walter B. Morgan and B. W. King, Respondents in the above styled and numbered cause, and files this their Reply Brief to the Application of Petitioner, Harlan Grimes, for a writ of Certiorari to the Court of Civil Appeals for the Tenth Judicial District of Texas at Waco, which affirmed the judgment of the District Court of Houston County,

Texas, under an opinion reported in Vol. 270, S. W. 2d, pages 282, et seq.

Questions Presented

(1) Is a Federal question in a suit to set aside two prior judgments timely raised, or does it come too late, where the petitioner, in three prior suits, all fully heard and adjudicated in the state courts, had an opportunity to raise such Federal question and failed to do so in each of said three prior suits?

(2) When parties have been fully heard in the regular course of judicial proceedings in the State Courts, does an erroneous decision in such proceedings deny a party of due process of law, within the meaning of the 14th Amendment of the Constitution of the United States, when such question was not raised in such proceedings?

(3) In any proceedings brought in the State courts of Texas, to vacate and set aside a judgment, is it necessary to join all parties to such judgment, under the laws of the State of Texas?

(4) Are such proceedings to vacate and set aside a judgment, where not all parties to such judgment are made parties, a collateral attack, under the laws of the State of Texas?

(5) Where a party has had full opportunity to litigate all issues, including any Federal question, in three prior litigations, are the judgments rendered in such three prior suits res adjudicata in a subsequent suit?

Statement of the Case

In lieu of Petitioner's "Statement of Material Facts" (Page 4-16, Petitioner's Application), Respondents respectfully submit the following statement:

The present suit was originally brought in the District Court of Houston County, Texas by Petitioner to set aside

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and cancel two prior judgments of said trial court. The first judgment attacked was Harlan Grimes, et al. vs. A. G. Talbot, et al., No. 7773 in the trial court, which judgment was affirmed by the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston July 27, 1950, in cause No. 12,195 on the docket of that Court and reported in 233 S. W. 2d 206, and The Supreme Court of Texas refused Writ of Error, N. R. E. This judgment was rendered on the pleadings, the trial court sustaining defendants' (Respondents' herein) Special Exceptions to the pleading of the Petitioner herein and his brother, Russell W. Grimes, who was his co-plaintiff in cause No. 7773, but is not a party to the present suit. There was no allegation of fraud in Cause No. 7773 and the suit was merely for the cancellation of a recorded assignment of one-half interest in certain lease-holds in Houston County, Texas. The Court of Civil Appeals held that "in the absence of any allegations of fraud" the question of whether petitioner and his brother were entitled to a cancellation "in any event" was not presented. The Court then held that title to the half interest in the leaseholds passed with the delivery of the assignment to the privities of the respondents herein, and that the condition in the assignment "if a condition it is" was a condition subsequent. (See Exhibit "I", pp. 85-92, Petitioner's Application)

The second judgment attacked by Petitioner's Application, is *Edwin T. Maynard et al* vs. *Harlan Grimes* and *Russell W. Grimes,* No. 7997 in the District Court of Houston County, Texas, wherein respondents herein and their privities brought suit for an accounting and a receivership of the leaseholds, and an agreed judgment was rendered March 22, 1951, adjudicating the interests of the parties thereto in accordance with the judgment rend-

ered in Cause No. 7773, and giving the management and control of the leaseholds to Respondent, E. W. Robitaille.

A third suit in this series (not mentioned by Petitioner in his application) was *E. W. Robitaille* vs. *Harlan Grimes*, No. 8053 in the District Court of Houston County, Texas wherein E. W. Robitaille, respondent herein, recovered judgment against Petitioner herein based on the judgment in Cause No. 7997 for one-fourth of the expenses of operating the leaseholds from April 1, 1951, to and including August 31, 1952, and attorney's fees. This judgment was affirmed by the Court of Civil Appeals for the First Supreme Judicial District at Galveston in an opinion reported in 257 S. W. 2d 359, and the Supreme Court of Texas refused writ of error, n. r. e. (See the opinion of Court of Civil Appeals for Tenth Supreme Judicial District of Texas, R.), The Judgment in this last cited case (No. 8053—257 S. W. 359) is not here attacked in the present suit, and in that suit (No. 8053—257 S. W. 2d 359) no attack was made on the two first judgments as is here made in petitioner's present suit, although Petitioner might have then and there raised his federal question.

The respondent's contentions as shown by his Petition and Supplemental Petition (R-35) as well as by his Application herein is that the judgment in Cause No. 7773 and No. 7997 were obtained by the fraudulent conduct of Respondents in that the Respondents Earle P. Adams, B. W. King and Walter B. Morgan, attorneys for the other respondents in said two first suits, and the other respondents by and through their said attorneys, presented arguments to the Courts that were opposed to Applicant's arguments and contentions, all of which were known to Petitioner prior to or during such litigations and that the trial court and appellate courts committed fraud on the

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Petitioner by agreeing with said arguments and deciding against applicant and his contentions. In addition thereto, Petitioner alleged (R. 30-35) that prior to the judgment in Cause No. 7997, Petitioner was prevented from taking the deposition of E. T. Maynard, by allegedly false representations of Respondents, the falsity of which Petitioner learned after judgment in 7997 but in view of the final decision of Cause No. 7773, the testimony sought to be adduced by such deposition, even if it could have been obtained, which is denied, would not have been admissable in the trial of Cause No. 7997.

Argument

Petitioner in the present suit here seeks to re-litigate the issues raised or which could have been raised in three prior suits, all tried and determined in the District Court of Houston County, Texas. The judgment in the first case (No. 7773 in the District Court) was affirmed by the Court of Civil Appeals at Galveston, 233 S. W. 2d 206; The Supreme Court of Texas refused Writ of Error, N. R. E. The second suit was Cause No. 7997 in which an agreed judgment was rendered. The third suit was No. 8053 in the District Court, which was affirmed by the Court of Civil Appeals at Galveston. 257 S. W. 2d 359. The Supreme Court of Texas refused Writ of Error, N. R. E. In none of these cases, did petitioner seek to raise any federal question, nor any question of fraud.

Petitioner invokes the jurisdiction of this Court in his application under Section 1257, Subsection 3, of Title 28, United States Code. (Petitioner's Application p. 2) This Section was derived from 39 *Statutes at Large* 726, chap. 448, enacted September 6, 1916. In construing the statute, in *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 490, 63 L Ed. 722 this Court used the following language, which

we submit is applicable and controlling in the construction of Section 1257:

> "The jurisdiction of this Court to review the final judgment or decree of the highest court of a state, in such a case as we have here, is defined in #237 of the Judicial Code (36 Stat. at L. 1157, chap. 231), as amended September 6th, 1916 (39 Stat. at L. 726, chap. 448, Comp. Stat. 1916, #1214), which provides that it shall be competent for this court, by certiorari, to require any such cause to be certified to it for review when there is claimed in it any title, right, privilege, or immunity under the Constitution of the United States and 'the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution.' It is settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice . . . and upon the question whether or not such a claim has been so asserted, the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion, for the purpose of defeating the claim of Federal right.' *Atlantic Coast Line R. Co.* v. *Mims,* 242 U. S. 532, 535, 61 L. Ed. 476, 478, 37 Sup. Ct. Rep. 188; *Gasquet* v. *Lapeyre,* 242 U. S. 367, 371, 61 L. ed. 367, 370, 37 Sup. Ct. Rep. 165, and cases cited."

The rule, as above stated, is supported also by *Meredith* v. *Winter Haven,* 320 U. S. 288, 88 L. Ed. 9, 64 S. Ct. 7; *Godchaux Co.* vs. *Estopinal,* 64 L. Ed. 312, 251 U. S. 179, 40 S. Ct. 116; *Missouri, K & T R. Co.* v. *Sealy,* 248 U. S. 363,

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63 L. Ed. 296; *Missouri P. R. Co.* v. *Taber,* 244 U. S. 200, 61 L. Ed. 1082; *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709.

Bonner v. *Gorman,* supra, on the facts, is most especially in point. In that case, as here, there were successive suits that went to final judgment in the state courts without any federal question being raised. In the trial on the Merits of the third suit (which was then before the Court), the petitioner raised for the first time a federal question by alleging that the petitioner was being deprived of his property without due process of law because the original judgment was null and void, and all other judgments based upon it were void also. In overruling petitioner's contention in that case, the Court used the following language:

> "It is firmly established that, when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States (*Central Land Co.* v. *Laidley,* 159 U. S. 112, 40 L. Ed. 94, 16 S. Ct. 80), and that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late."

Further, it is well settled, that unless a federal question was necessary to the judgment of the state Court, or in fact was made the ground of it, this court is without jurisdiction to review it. *Bonner* v. *Gorman,* supra, and cases there cited. Stated another way, a review by this Court is precluded if the decision of the state court is upon a non-Federal ground or a point of local or general law sufficient to support the judgment. 54 *American Jurisprudence* 802; *Id,* 826, and cases there cited.

In the case at bar, the decision of the Court of Civil Appeals for the Tenth Judicial District was based on two grounds: (1) One of the parties (Russell W. Grimes) whose interest was adjudicated in both Causes Nos. 7773 and 7997, was a necessary party to the present suit to set aside those judgments and since he was not a party, the attack on those two judgments was collateral in nature and not permissible; and (2) The facts alleged by Petitioner in his pleadings were fully adjudicated in the prior litigations mentioned in the foregoing statement of the case.

These two rules of general law were the basis of the judgment of the Texas court of civil appeals. The first rule is supported not only by the cases cited by the learned Waco court, but also by *Pure Oil Company* vs. *Reece*, 124 Texas 476, 78 S. W. 2d 932, *Hartel* v. *Dishman*, 135 Tex. 600, 145 S. W. 2d 865, 870. The last cited case succinctly states the rule as follows:

> "The rule is well settled in this State that where a proceeding is instituted to vacate and set aside a judgment, the parties to the judgment must be made parties to such proceedings, and unless that is done the attack is necessarily a collateral one. (Citing many authorities)."

The second rule is not only supported by the authorities cited by the excellent opinion of the Waco Court, but also by one of the authorities cited to this Court by Petitioner. *Postal Telegraph Cable Co.* v. *City of Newport*, 247 U. S. 464, 476, 38 S. Ct. 566, 62 L. Ed. 1215, 1221, wherein this Court stated:

> "The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had

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an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. Ed. 355, 376, 18 S. Ct. Rep. 18; Greenl. Ev. ## 522, 523."

See also *30 American Jurisprudence* 910, #165, and the authorities there stated.

It is conceded that in both of the cases cited by Petitioner *Postal Telegraph Cable Co.* v. *City of New Port,* supra, and *Hansberry* v. *Lee,* 61 S. Ct. 115, 311 U. S. 32, 85 L. Ed. 22, this Court held in perfectly reasoned opinions that the application by the state courts of the rule of res adjudicata resulted in a denial of due process to one of the litigants. In both of those cases, however, the litigant so wronged was *not* a party to the prior suit. Obviously such facts clearly distinguish these cases from the case at bar. Similarly Petitioner has cited many cases supporting eminently correct rules of law, but the facts in each of such cases are in no way analogous to the facts in the case at bar, and such cases and rules do not apply to, much less control, the case now before this honorable Court.

It appears that the main burden of Petitioner's argument is stated in his "Statement of Material Facts" at page 6 of his application that in the original suit, No. 7773 in the District Court of Houston County, No. 12,195 in the Court of Civil Appeals at Galveston (233 S. W. 2d 206), the latter court found "practically all the facts and all the law" in favor of Petitioner and his brother, Russell W. Grimes, affirmed the established law of Texas and then in the same decision, overruled the established law. The only case cited in the opinion of the Galveston court was *Manton* v. *City of San Antonio,* 207 S. W. 951, which Petitioner cites many times in his application herein as supporting his contention. Petitioner concedes in effect

at page 25 of his Application that if the allegedly erroneous opinion of the Galveston court did not result in an erroneous disposition of that case, then his Application is without merit. (This, notwithstanding the holding of *Bonner* v. *Gorman,* supra, quoted above).

We submit that *Manton* v. *City of San Antonio,* supra, fully supports the decision of the Galveston court. In that case, the instrument under consideration was a deed which contained in the deed itself the following provision:

> "This deed is given, however, subject to the condition that Obraje or Travis street, between North Flores street and Main avenue, will be widened within two years from the date hereon; otherwise the title to revert to the grantor herein."

The deed was delivered to an agent of the grantee for deposit in escrow with a bank and was so deposited in escrow. The court found that a consideration, other than the widening of the street had been given in consideration of the deed and that there was a substantial performance of the condition. The court stated:

> "There is no exception to the rule that a deed cannot be delivered to the grantee as an escrow, but if delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself.
>
> * * * * *
>
> "If there had been no delivery of the deed to the bank to be held as an escrow, the law as to condition subsequent would undoubtedly be applicable, and a substantial compliance with the terms of the condition would satisfy the law and prevent a forfeiture of the title. * * *

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> " • • • where there have been other considerations performed, • • • the condition will not be considered a condition precedent, but will have applied to it the rules applicable to conditions subsequent."

The Court then held that, even though the deed contained the condition quoted in the deed itself and even though the deed was properly escrowed with the bank, that because there were "other considerations performed", the condition would be treated as a condition subsequent, which was satisfied by substantial performance.

The Galveston court, in the opinion of which Petitioner complains, found that the Appellants' (Petitioner herein and his brother) pleadings showed: that "There is nothing in the language of the assignment which in and of itself should show that the completion of the fourth well was made a condition precedent to the vitality of the assignment;" that "there is nothing in the contract to show any intention that title should not pass upon the delivery of the assignment out of escrow;" that Appellants' protection to prevent the passing of title until the completion of the fourth well was the escrow (in other words, the completion of the fourth well was a condition precedent to DELIVERY of the assignment); that Appellants in a letter plead by them, authorized the escrow agent to make delivery; and that "the delivery was a lawful one and appellants do not here claim otherwise;" that Appellees (Respondents herein and their privities) had performed a substantial compliance with the condition although "the fourth well lacked something of completion;" that the consideration performed by Appellees was not only the "completion" of the fourth well but the drilling, equiping and completion of the first three wells and also the "drilling" of the fourth well into the Woodbine sand.

The Galveston court held in effect that, since considerations other than the "completion" of the fourth well were performed, under *Manton* v. *City of San Antonio,* the condition (in the assignment) "if it is a condition" (not being expressly in the assignment) must be held to be a condition subsequent; and secondly that the condition precedent in the contract was a condition precedent to *delivery* of the assignment and waived when Appellant authorized delivery, and took in satisfaction of the condition of the condition the promise of Appellees to complete the fourth well. Either of these holdings will support the judgment, and both of them directly and precisely follow *Manton* v. *City of San Antonio.*

We further respectfully urge that Petitioner's application should be denied and refused for the reason that "the asserted Federal right is so wanting in foundation and so unsubstantial as to be devoid of all merit and frivolous." 54 *Am. Juris.* 825, #191, n. 6, and authorities there cited.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Court deny Petitioner's application for a Writ of Certiorari to the Court of Civil Appeals for the Tenth Judicial District of Texas at Waco.

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